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MONTGOMERY COUNTY LAW REPORTER,

CONTAINING CHIEFLY

REPORTS OF CASES

DECIDED BY

THE COURTS OF MONTGOMERY COUNTY,

TOGETHER WITH ALL THE CASES ARISING IN SAID COUNTY, DECIDED BY

THE SUPREME COURT OF PENNSYLVANIA,

FOR THE YEAR 1887.

VOL. III.

REPORTED BY F. G. HOBSON,

OF THE MONTGOMERY COUNTY BAR.

NORRISTOWN, PA.:

1888.

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Rec. Nov. 13, 1876.

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Court of Oyer and Terminer of Montgomery County.

COMMONWEALTH VS. JOHN M. WILSON.

The first section of the act of May 14, 1874, P. L. 160, was not intended for the appointment of a commission to inquire into the insanity of a prisoner under sentence of death in order to stay the execution of his sentence; but solely to enable the court to remove an insane prisoner to an asylum for treatment; which was not the prayer of the petition in this case.

The court having no jurisdiction to stay the execution of a death sentence, the appeal should be made to the Governor, who has the power to appoint a commission to inquire into the facts and to act upon their report.

APPLICATION for commission in insanity.

John M. Wilson was convicted of murder in the first degree and sentenced to death. The warrant of the Governor fixed the date of his execution on January 13, 1887.

On December 18, 1886, Cadwallader Biddle, General Agent and Secretary of the Board of Public Charities of the commonwealth, presented his petition setting forth the above facts and saying that "it is believed by those competent to form an opinion thereon that the said John M. Wilson is insane," and prays the court "to appoint a commission under the act of May 14, 1874, Section 1, to inquire and report on the said alleged insanity of said prisoner."

To this petition is appended the following certificate:

"This is to certify that in our opinion, based upon an examination, there is sufficient evidence of insanity in the prisoner, John M. Wilson, now confined in Montgomery county prison under sentence of death, to justify an official inquiry into the condition of his mind."

(Signed) HIRAM CORSON,
R. H. CHASE,
ELLWOOD M. CORSON.

George W. Rogers and *D. O. Rogers, Esqs.*, for application.

The opinion of the court was delivered December 20, 1886, by BOYER, P. J.

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Com. vs. John M. Wilson.

This is an application made under the first section of the act of May 14, 1874, P. L. 160, for the appointment of a commission to inquire and report upon the mental condition of the prisoner, who was convicted on the 15th day of March, 1886, of murder in the first degree, and has been under sentence of death ever since June 7th, 1886. Insanity was not set up as a defence upon his trial, nor would the evidence then elicited have justified his zealous and able counsel in relying upon such a plea.

Now, for the first time since his conviction, and within a short time before the day fixed for his execution, this application is made. The prisoner, it is true, might have become insane since his trial; but the petition does not so state, nor that his mental condition has lately undergone a change. The petitioner does not himself swear to any personal knowledge, nor to his own belief. Nor is the petition accompanied by the affidavit of any one person who swears or affirms to his individual belief in the prisoner's insanity. To the petition, however, is appended a certificate signed by three highly respected physicians, who certify that in their opinion "there is sufficient evidence of insanity in the prisoner to justify an official inquiry into the condition of his mind." But neither of them expresses his own belief that the prisoner is actually insane, or that he is of such unsound mind as not to be legally responsible for his acts; nor do they state of what the evidences of insanity consist.

The petition, too, according to the act, should have contained a prayer that the prisoner should be removed to a hospital for the insane. This prayer, which expresses the very object of the act, is not in the petition. And here we come to another and broader ground upon which this application should be refused. The evident and sole object of the first section of the act of Assembly referred to was to provide for the removal of an insane inmate of a prison to an asylum for treatment, and was not intended, as here, to be used for the purpose of delaying the execution of a death sentence. The court would have no jurisdiction to arrest an execution even if satisfied of the insanity of the prisoner. That power rests with the Governor alone. If the court were to appoint a commission the most it could do would be to transmit a copy of the report of the commission to the Governor.

In the case of John McGinnis in 1884, reported in 14 W. N. C., 221, a similar application was made in the Oyer and Terminer of

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Philadelphia on the eve of an execution, and the court refused the application; although four physicians, who had examined the prisoner, made positive affidavits that they believed him to be insane and unfit for capital punishment. Upon application to the Supreme Court it refused to interfere.

When the object is to stay the execution the proper application is to the Governor, who alone has the power to interfere for that purpose; and he has the authority himself to appoint a special commission to inquire and inform him of the facts. Or he can call on the state committee on lunacy to examine and report to him officially upon the subject. The appeal should be to him, who alone has the power to act effectually in the matter.

And now, December 20, 1886, the prayer of the petition is refused.

Court of Common Pleas of Montgomery County.

IN EQUITY.

BURGESS AND TOWN COUNCIL OF THE BOROUGH OF NORRISTOWN VS. PENNSYLVANIA RAILROAD COMPANY, LESSEE, ETC.

Permission granted to a railroad company to lay a double track upon and along a certain street in a borough carries with it the implied right to construct the necessary turn-outs and sidings for the accommodation of business establishments.

But in locating and constructing such appurtenances the railroad company is bound to avoid doing wanton or needless injury to the public highway; and if they have entered into a contract under which they hold their privileges they must observe its provisions in regard to their treatment of the street where they lay their rails, which it is to be presumed in the first instance they will perform in good faith.

MOTION to dissolve preliminary injunction.

Charles H. Stinson and *H. K. Weand, Esqs.*, for motion.

J. P. Hale Jenkins, Esq., Borough Solicitor, contra.

The facts are fully disclosed by the opinion of the court delivered December 15, 1886, by BOYER, P. J.

A preliminary injunction was granted on the 4th of this month to restrain the defendants from constructing another track upon Lafayette street across Ford street in the manner described in the bill of the plaintiffs; with leave to defendants to move to dissolve the

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same. This motion was made, and affidavits filed on both sides and a hearing had.

Before the railroad of defendants was laid upon Lafayette street the "Philadelphia, Norristown and Phœnixville Railroad Company" (whose successor the defendant company is) requested of the plaintiffs the passage of an ordinance granting the said company the right of way for their railroad upon and along Lafayette street, through the borough of Norristown. Such an ordinance was passed by the Town Council, and the right of way granted subject to certain conditions, which were accepted by the railroad company by resolution of their Board of Directors. In constructing their railroad the company was bound by the terms of the ordinance which they accepted. If they varied in any respect from the precise provisions of the concession it was either by the express or implied consent of the borough authorities. Now, however, the borough authorities intervene to prevent, as they aver, an infringement of the public rights on Lafayette street west of Ford by the threatened construction of another track, which will narrow the cart or wagon way at that point on the northerly side of the street and, as they say, seriously interfere with the convenience and safety of the public travel at the northwesterly corner of the two streets mentioned.

A plan or draft of the proposed track has been filed by the defendants, and affidavits on their part declare that the track complained of is only intended for a necessary turn-out for the accommodation of the extensive oil works of William Slemmer situated at the corner of Lafayette and Ford streets, and to be constructed upon a plan best adapted for that purpose.

When permission was given by the ordinance mentioned to construct a double track railroad upon Lafayette street, of course the right to lay the necessary turn-outs and switches for the accommodation of business was implied. Every such device laid down and leading from the main tracks for that purpose, however, must to some extent interfere with ordinary public travel, as during the shifting of cars for loading or unloading it will always be a temporary impediment. Such minor inconvenience must necessarily be submitted to on account of the greater general convenience which railroads and their appurtenances bring with them.

But in locating and constructing such turn-outs the railroad company is bound to avoid doing wanton or needless injury to the

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public highway; and if they have entered into a contract under which they hold their privileges they must observe its provisions.

By the draft which the defendants have filed, and by which they will be bound, the outer rail of the proposed turn-out does not approach the curb line at the northwesterly corner of Lafayette and Ford streets within the distance of nine feet and six inches; and this is the nearest approach to the line of curbing at present standing on that side of Lafayette street west of Ford street; and from that point westward the distance from the curb line increases. If the curb line were moved back six feet, as originally contemplated by the ordinance referred to, the width of the ordinary road way would be increased that much. But as the sidewalk now is, the unoccupied space of nine feet six inches, if properly graded, and paved with cubical blocks of stone, as defendants are bound to do, would afford a safe passage around the corner, except when cars are actually being shifted.

I have considered whether the occasion for the location of the frog west of Ford street might not be avoided. But the advantages of its location east of that street seem counterbalanced by disadvantages equally apparent. All things considered, I am not prepared to say that the defendants ought to be enjoined from constructing the turn-out as proposed; provided the defendants will perform their duties in carrying it out as they are under obligation to do, by adjusting the proper levels, paving the road way, and planking the crossings of the two streets. I can not at present assume that they will not perform this work in the best manner, according to the true intent of the contract they made with the borough. If they should fail in this they may be held amenable hereafter in the final action of the court upon the pending bill; and if, contrary to their declared purpose, they should create a nuisance, the timely action of the Town Council in filing the present bill will afford the means for its abatement.

I desire it to be distinctly understood that the action about to be taken is based upon the presumption that the defendants have in good faith represented that the construction of the track complained of is intended only for the purposes of a turn-out and siding for the accommodation of the oil works mentioned. If it were intended for the commencement of another continuous track a different question would be presented, namely, as to whether the defendants have not

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already appropriated the twenty feet granted and accepted for that purpose west of Ford street, although not along the centre of the street as originally intended.

And now, December 15, 1886, the preliminary injunction is dissolved.

Orphans' Court of Montgomery County.

Estate of Hannah Tyson, Dec'd.

Although it is settled law in Pennsylvania that a bequest of the income or interest of a fund, without more, is a bequest of the fund itself, this rule of construction can only be applied where no contrary intention can be gathered from the will. Where the use is expressly limited to the natural life of the legatee, and there is no express bequest of the principal over, yet if the context of the will plainly indicates the intention of the testator in limiting the use to the life of the first taker was to provide a fund for the payment of other legacies payable only after the death of the first beneficiary such intention must prevail.

Petition of Margaret Johnson, legatee under the last will and testament of Hannah Tyson, deceased, for a decree directing the executors of said last will and testament to pay over to said petitioner the sum of two thousand dollars, the principal of said legacy.

George W. Rogers, Esq., for petitioner.

Larzelere & Gibson, contra.

The facts fully appear from the opinion of the court delivered January 3, 1887, by Boyer, P. J.

The bequest in the will of Hannah Tyson under which the petitioner claims is in the following words, viz.: "I give, devise and bequeath to Margaret Johnson the interest of two thousand dollars during the term of her natural life." Immediately following thereafter is the following bequest, viz.: "I give, devise and bequeath after the death of Margaret Johnson to Upper Dublin Friends' meeting one thousand dollars in money, the income thereof for the care of the grave-yard." And immediately following, as the will was originally written, is the clause, "I give and bequeath also, after the

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death of Margaret Johnson, to the Fitswater grave-yard one thousand dollars, the income of which to be expended for the care thereof."

Between these latter two clauses has been inserted, as part of the will, a piece of paper pasted on, containing the following words: "I give and bequeath to Margaret Johnson all my clothing."

This addition was evidently an afterthought, and owes its position in the will to the bottom of the page affording a convenient space for pasting. The question of construction presented is whether the bequest first mentioned carries with it the *corpus* of the two thousand dollars absolutely, or whether the legatee is only entitled to receive the interest thereupon during life.

It is well settled law in this state that the bequest of the income or interest of a fund, without more, is a bequest of the fund itself. But this rule of construction can only be applied where no contrary intention can be gathered from the will. And where the use is expressly limited, as here, to the natural life of the legatee, although it may not of itself prevent an absolute vesting, it is sufficient to arouse and stimulate inquiry whether there can not be found in the will an object for such words of limitation to provide for another operation of the fund after the death of the first taker.

In the will under consideration, immediately after the bequest for life come two charitable bequests, which together make up the exact sum to be for the use of Margaret Johnson for the term of her natural life; but not to be paid until after her death. Why was the payment of these charitable legacies to be postponed until after her death unless associated with the fund, the interest of which was to go to Margaret Johnson during her life? There is in the will no direction to invest any other such sum to await the death of Margaret Johnson; and no motive apparent for such a postponement unless the principal in the meantime had been set apart for some useful purpose. These bequests following each other consecutively seem to show the train of thought by which they are connected, and dispose of the two thousand dollars according to what the context indicates to have been the intention of the testatrix almost as plainly as if the scriviner had more fully expressed in words the object of the limitation of the bequest of interest to the natural life-time of

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the first beneficiary. The testatrix afterwards disposes of her entire residuary estate.

For the foregoing reasons we hold that the bequest to the petitioner was intended to terminate with her life in accordance with the language of the will, and that she is not entitled to the possession of the principal fund without furnishing adequate security for the preservation of the principal, and its payment to the beneficiaries entitled to the same after her death.

The answer of the executors also claims protection because of the distribution stated in their account; which was finally confirmed under the rules of court, no exceptions having been filed thereto; in conformity with which they claim to have paid out the whole estate in their hands. To what protection they would be entitled upon that basis, in case the present ruling of this court upon the construction of the will were reversed, it is not necessary at present to decide.

And now, January 3, 1887, the petition is dismissed at the cost of the petitioner.

Court of Common Pleas of Berks County.

MARKLEY VS. SPIRES.

A defendant who has conveyed away the title to real estate sold by the Sheriff under an execution, is not entitled to claim $300 out of the proceeds of the sale of such real estate, by virtue of the exemption law.

RULE to show cause why the proceeds of Sheriff's sale of real estate should not be paid to defendant under his claim to exemption.

D. E. Schroeder, Esq., for rule.

Bland & Dettra, Esqs., contra.

The facts fully appear from the opinion of the court delivered November 20, 1886, by ERMENTROUT, J.

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The defendant who disclaims title to property can not claim the $300 exemption out of the proceeds of sale. As was said in Gilleland vs. Rhoads, 10 Casey, 190: "A debtor who shuffles and conceals his property, denies his ownership, and does his best to defeat the lawful process of his creditor, is not the proper object of the statute's bounty."

It appears in this case that defendant denied that he owned the real estate levied upon and sold. It is admitted that at the time of demand for appraisement the title had been conveyed by defendant and his wife to their son, and by the son to the wife. The case of Larkin vs. McAnnally, 5 Phila. R., 17, is a case precisely in point. It was there held that a grantor of real estate can not claim the $300 exemption out of the proceeds of the land sold in his name after he has conveyed it to another. As Judge Hare tersely put it, "his deed is proof that he has nothing in the premises, and that from nothing nothing can come."

The appraisement may be considered, under the authority of Gilleland vs. Rhoads, one that ought not to have been made, and one which, though made, may be disregarded.

It follows, therefore, that so far as defendant is concerned he has no right to the proceeds of sale, and is in no way interested in law in the disposition of the proceeds for the purposes claimed.

Rule discharged.

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Court of Quarter Sessions of Bucks County.

COMMONWEALTH VS. DUCKWORTH.

A witness claiming the privilege to testify under the act of May 21, 1885, may have his character for truthfulness attacked.

That it may have had a tendency to prejudice the jury against him is no ground for a new trial.

RULE to show cause why a new trial should not be granted.

The defendant was indicted for assault and battery with intent to commit a rape.

George Ross and *L. L. James, Esqs.*, for rule.

H. B. Eastburn, Esq., contra.

The facts fully appear from the opinion of the court delivered December 6, 1886, by YERKES, P. J.

The commonwealth having rested her case, the defendant was called to the witness stand and, at his request, permitted to testify in his own behalf. After the defendant rested the District Attorney produced a witness to prove the bad character for truth of the defendant. The offer was resisted and an objection taken, but the court allowed the questions as to the character of the defendant for truth to be asked in the usual form.

He complains that in this there was error. The reason of the complaint seems to be that the court imposed too great a hardship upon him; and that while the evidence was allowed to go to the jury only to affect his credibility as a witness, and they were so instructed, yet as a matter of fact it had a tendency to influence their minds as to his general character and to unfairly prejudice them against him.

It is settled that in each case the character sought to be proved must not be general but such as would apply to the particular crime with which the defendant is charged. Proof that a man is dishonest or untruthful by character will not be evidence to show that he committed a murder or rape.

In order to discredit a witness it is competent to offer evidence attacking his character for truth and veracity; but the question must be confined to veracity. And before the impeaching witness can be

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asked to give his knowledge of character the court must be satisfied that he has adequate means of knowledge of the character of the impeached witness for truth, which is the matter under inquiry.

We were careful to protect the defendant, under these rules, from injury other than might necessarily result from his own voluntary act. The reasons which have induced courts to hold that knowledge of general character, or of character applying to one class of offences, will not render a witness competent to testify regarding character applicable to a particular and another offence, leads to the conclusion that the evidence admitted could not have had the effect which the defendant apprehended.

The act of May 21, 1885, provides that the person charged with a crime shall, at his own request, but not otherwise, be deemed a competent witness; but his or her neglect, omission or refusal to testify, shall not create any presumption against him or her, nor shall any reference be made to, nor shall any comment be made on, such neglect, omission or refusal, by counsel in the case during the trial of the cause.

Thus the law gives him every protection so long as he remains in the attitude of resting upon his constitutional rights and of challenging the commonwealth to prove him guilty beyond a reasonable doubt. But it is noticeable that the act only protects him so long as he neglects or omits to become a witness. If he incurs any peril, he, not the law, is answerable; only by his voluntary act can it arise.

He went upon the stand not as the defendant in the case about whom the law had drawn this coat of mail, but rejecting and throwing it away as useless he became a witness—a competent witness, it is true; but the competency which the act permitted him to avail himself of did not relieve him from being subjected to those tests of the truthfulness of his story which it has been found necessary to apply to every witness. His manner and deportment on the stand, the character of the story he told, its probability and reasonableness, were all necessarily proper matters for the consideration of the jury in testing his credibility; and had the commonwealth offered to contradict his statements as to any material matter by direct and positive evidence, it would have been admissible. These matters would all be competent evidence in the case upon the question of the credibility of his entire narrative to the jury. I can see no reason why

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one kind of evidence to affect his credibility should be excluded and another admitted.

The defendant placed himself in a position for attack. He sought the advantage—for such he must have believed it—of testifying. The law makes him a competent witness. It does not provide, however, that he must be believed. If, when subjected to the tests applicable to other witnesses, he failed, he is not in a position to ask the court to relieve him of the consequences of his own mistake. In the case of the State of Rhode Island vs. McGuire, 1 Eastern Rep., 451, it was held that a defendant who testifies in his own behalf may be impeached like any other witness, by showing his previous conviction of a felony. This reason for a new trial was earnestly urged upon me. I do not deem it sufficient.

There was sufficient evidence in the case to sustain a verdict of guilty. The crime charged is a foul one, subjecting the defendant to a severe punishment. His case was ably and thoroughly tried by counsel. The court was particularly careful to protect the defendant in every right, and in the charge to the jury took great pains to impress upon their minds the character and importance of the reasonable doubt, giving the defendant every advantage the law would allow. A carefully selected, intelligent and thoroughly competent jury, after mature deliberation, have found him guilty in manner and form as indicted. The court can not say they were wrong or mistaken in their conclusion, nor can it recall that any mistake was made on the trial. There is no reasonable ground to believe that a new trial would result more favorably for the defendant.

The rule is discharged and judgment will be pronounced upon the verdict.

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Court of Quarter Sessions of Montgomery County.

In re Extension of Moore Street in the Borough of Norristown.

Where the Court of Quarter Sessions has, under an act of Assembly, jurisdiction to lay out streets in boroughs, "*with the consent of the town council;*" but the act is silent as to the manner of giving consent, a street laid out by viewers, to whose report no exceptions are filed, and after final confirmation by the court, the town council fix the grade of the street, and proceed to open it and put it in condition for travel, the consent of town council is sufficiently manifested; and a land owner afterwards is too late with his application to set the proceedings aside upon the ground that the written consent of the town council was not filed pending the proceedings for the street.

Rule to show cause why proceedings should not be rescinded.

N. D. Tyson, Esq., for rule.

H. A. Stevens and *J. P. Hale Jenkins, Esqs.*, contra.

The facts fully appear from the opinion of the court delivered January 17, 1887, by Boyer, P. J.

Upon the petition of citizens of the Fifth ward of the borough of Norristown for viewers to lay out a road or street from the eastern terminus of Moore street to Sandy street, in the said Fifth ward, viewers were appointed by the court, who on the first day of December, 1884, filed their report laying out said street; which was duly confirmed *nisi*, and the street ordered to be opened fifty feet in width. The report laid over under the rules of court for exceptions until the next stated regular term of court, which was held in March, 1885. No exceptions were filed, and at the end of March term the report was finally confirmed; and on the 20th of April, 1885, an opening order issued. The road was accordingly opened and graded by the borough authorities; and was used for public travel, and is still so open and traveled.

On the 2d of August, 1886, a land owner through whose land the road has been laid, and to whom damages were assessed by the viewers, presented his petition to the court to rescind its decree of confirmation and set aside the report of the viewers on the ground that the written consent of the town council of the borough of Norristown did not accompany the petition for the road, and was not filed of record at the date of its confirmation.

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Moore Street.

The basis of this application rests upon the act of May 9, 1871, P. L. 639, which was an act passed to extend the jurisdiction of the Court of Quarter Sessions in the laying out and vacation of roads in all the boroughs of the county of Montgomery; in the boroughs incorporated under the general borough law, as well as those under independent charters. But in the latter, by whose charters no authority to lay out streets was vested in the borough councils, the court had authority to lay out streets under the general road laws of the state. See Road in Milton, 4 Wr., 300. It is questionable whether in the latter class of boroughs, of which Norristown is one, the act of 1871 takes away from the court any part of the jurisdiction it had before, so as to require the consent of the borough council. But the supervision of the borough council in such cases is a salutary provision; and this court has always required their consent. Had the attention of the court been called to the fact that the written consent of the town council did not accompany the petition, the court would have suspended the appointment of viewers until that formality had been complied with.

But the act is silent as to the manner in which the borough council shall signify its consent. It may be presumed to consent when it makes no protest, and files no exceptions to the action of the viewers; and especially is its consent apparent when, as in this case, it fixes the grade of the new street, and proceeds, through its street and road committee and its employes, at the borough expense, to do the grading and adapt the street to public travel. It scarcely needed the resolution, now certified and filed, of their consent and approbation.

After all this has been done, and more than a year and three months elapsed since the opening order issued without objection, it is now too late for this application.

And now, January 17, 1887, the rule is discharged.

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Court of Common Pleas of Montgomery County.

DAVISON, YOUNG & CO. vs. CLIFFORD & SMITH.

On an appeal from the award of arbitrators the court will not quash the appeal for a defect in the recognizance in the first instance; but will require the appellee to rule the appellant to perfect his appeal, before a motion to quash will be entertained.

A defendant may appeal for himself from an award against a defendant firm in which he denies partnership.

A deputy prothonotary has authority to administer the oath and take the recognizance required in an appeal from an award of arbitrators.

RULE to show cause why the appeal from the award of arbitrators should not be stricken off.

George N. Corson, Esq., for rule.

Charles Hunsicker and *N. H. Larzelere, Esqs.*, contra.

The opinion of the court was delivered January 17, 1887, by BOYER, P. J.

Formerly the Supreme Court held with great strictness the responsibility of appellants for any defect in their recognizance on an appeal from an award of arbitrators, or from the judgment of a justice of the peace; and quashed the appeal for a material defect in the first instance. But now, and ever since the case of Means vs. Trout, 16 S. and R., 349, it is required of the appellee to rule the appellant to perfect his appeal before a motion to quash will be entertained.

Chief Justice Gibson, in Means vs. Trout, gives the reason for this change in the following words: "Great hardship, I fear, has been suffered in consequence of the strictness with which these matters have been considered in this court. When bail has been defectively given within the period prescribed there can be neither injustice nor hardship in suffering the appellant to perfect it as soon as the defect is discovered. Such a practice would be in analogy to bail at common law. On the other hand, if a defect in the recognizance were irreparable, the appeal would be lost and a great constitutional right frustrated. The court then overrule the decisions earlier made to the contrary, and declare that in the case of a defective recognizance on an appeal from the award of arbitrators the proper course is in the first instance to call upon the appellant by

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rule to perfect his bail within a specified period, or in default of it to have his appeal quashed."

This has been the recognized practice ever since. See Burgess of Huntingdon vs. Jackson, 2 P. and W., 431; Weidner vs. Mathews, 1 Jones, 336. In the latter case it is also held that the objections to the recognizance must be taken in reasonable time, and before other steps are taken to prepare the case for trial, or they will be considered as waived. In the case at bar two years and four months less three days elapsed between the date of the appeal and the date of the present application; and in the meantime the case was marked for trial repeatedly by counsel on both sides. See on this point Ziegler vs. Fowler, 3 S. and R., 238; Wilson vs. Kelly, 2 W. N. C., 482. There are also some errors, evidently clerical, in the affidavit, to which these remarks will apply.

Another ground assigned for this rule, in one of the cases, is that the appellant has appealed only for himself and not for the defendant firm. But that he may do this will appear by a reference to the cases upon this subject cited in the first volume of Brightley's Digest of Pennsylvania cases, page 91. Besides the appellant denied association as partner with the defendant firm, and filed his affidavit to that effect in time under the rules of court. His severance in the appeal was therefore consistent.

The remaining ground of objection is that the Deputy Prothonotary took the affidavit and recognizance, and not the Prothonotary in person. But it is clearly settled that all ministerial acts may be done by deputy, and of such nature are the taking of the affidavit and recognizance on an appeal from an award of arbitrators. See Reigert vs. McGrath, 16 S. and R., 65; Com. vs. Finney, 17 S. and R., 282; Com. vs. Anvand, 1 R., 282; Drumheller vs. Mumaw, 9 Barr, 19; Worral vs. Barger, 2 Brews., 1; 29 Leg. Int., 155.

The act of February 12, 1874, cited by the counsel for plaintiff, does not restrict the powers of the Deputy Prothonotary, but enlarges them, making him the temporary successor of his principal when in certain contingencies the office becomes vacant.

And now, January 17, 1887, the motion to quash is overruled and the rule dismissed in each case.

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Court of Quarter Sessions of Montgomery County.

COMMONWEALTH VS. A. J. CASSATT AND SAMUEL DUNCAN.

Township supervisors; their duties and responsibilities in regard to the public roads, and the removal of obstructions therefrom: when indictable for neglect of these duties.

INDICTMENT for nuisance.

District Attorney John W. Bickel and *G. R. Fox* and *G. R. Fox, Jr., Esqs.*, for commonwealth.

Charles Hunsicker and *Joseph Fornance, Esqs.*, for defendants.

The facts fully appear from the charge of the court delivered December 16, 1886, by BOYER, P. J.

Gentlemen of the Jury—The defendants, A. J. Cassatt and Samuel Duncan, are supervisors of Lower Merion township, and they are indicted in this case for permitting a nuisance to exist in the obstruction of a road laid out according to law, and which the public had a right to travel over to and fro as they chose. Supervisors are important municipal officers, and they have certain duties to perform, for the neglect of which they are indictable. It is their duty to open public roads laid out according to law, and to keep them in repair. It is their duty when an obstruction exists in a public highway which interferes with the free passage of the people along it, to see that it is removed; and if a dangerous place exists in any public highway within their jurisdiction, it is their duty, as soon as they know of it, to take measures for its abatement, and in the meantime to guard the public from the danger with which the obstruction may threaten them. And it is important to the township that these duties should be performed, because the township would be liable for any damages sustained by a traveler by reason of the dangerous condition of the highway.

But supervisors are not expected to perform impossible things, and they are expected only to exercise reasonable care, and to act with reasonable promptness whenever they are called upon to interfere with an obstruction of the highway. If a storm were to come along and sweep away a bridge in one of the public highways, it would take some time to repair it, and in the meantime the supervisors would not only be justified but it would be their duty to put

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a barrier up on either side of the obstruction, or to give some suitable warning to the public approaching that part of the highway; and it would be their duty, further, to remove the obstruction as soon as reasonably practicable. If they were to create an obstruction themselves without any reasonable cause, such as I have mentioned, they would, as a matter of course, be liable to indictment. In this case the real obstruction of the highway consisted in the removal of a bridge across the railroad by the railroad company. If this was done without the knowledge or consent of the supervisors, they would not be responsible for the obstruction caused thereby. If they were forewarned that it was about to be done, it would have been their duty to take reasonable measures to prevent it. But after it was done, if the railroad company had not themselves put up fences across the highway to prevent persons from falling down the precipice on either side of the railroad in consequence of the removal of the bridge, the supervisors themselves should have erected such barriers. Therefore, for the erection of the fences under such circumstances, the act of the supervisors would have been commendable; and if the railroad company put them up, it was proper for the supervisors to allow them to remain up so long as the passage along that highway within them was dangerous to public travel.

If these defendants be guilty it is because of their allowing the bridge to be removed by the railroad company, or by reason of their allowing it to remain removed, if in their power to have had it replaced. In order to convict the defendants under this indictment it will be necessary that you should find that they neglected some plain duty, or that they omitted to do that which under the circumstances it would have been their duty to do. Now, what is the evidence bearing upon this question with regard to their neglect of duty? It seems that the first circumstance which was calculated to call the attention of either of the supervisors to a contemplated change in the highway at the point in question, was a letter which was written by Esquire Perry L. Anderson to Mr. Duncan, informing him that he was advised that a change was about to be made in that part of the road. It seems uncertain whether the bridge was mentioned or not, though Mr. Anderson has an impression that the bridge was alluded to, but he is not positive; and Mr. Duncan declares that all that was said was that there was about to be a change, as he (Perry L. Anderson) was informed, in the road about that

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place. What did Mr. Duncan do? He went to see Mr. Anderson upon the subject, and you will remember what took place. Shortly afterwards he received a notice, which was served by the constable upon Mr. Duncan, signed by G. R. Fox & Son, attorneys for Percival Roberts, and dated July 26, 1886, which reads thus:

To A. J. Cassatt and Samuel Duncan, Supervisors of Lower Merion Township:

GENTLEMEN—You are hereby notified that the Pennsylvania Schuylkill Valley Railroad Company are about to remove a bridge over the Conshohocken state road at the point where the said railroad now crosses said state road on the line of Percival Roberts, and to close up said road altogether. We are of opinion that they have no lawful right to do so, and you are hereby required to prevent them from obstructing it in any way. You will be held liable for any neglect of duty in this matter.

What then did Mr. Duncan do? It seems that at this time the other defendant, Mr. Cassatt, was out of the state, and the notice was served upon the person who was left by him in charge of his duties as supervisor, who communicated the notice to Mr. Cassatt. Mr. Duncan then, the same day, went to the bridge, and he found that it was already partly taken down, and had been rendered impassable for travel. The same day he came to Norristown to consult counsel. He consulted Mr. Fornance; and, in behalf of Mr. Cassatt, he consulted Charles Hunsicker. They both advised him that the railroad company had a right to remove the bridge. Before he had gone to Norristown to consult counsel he notified the persons who were engaged in removing the bridge that they should not do it; they would get themselves into trouble. Then he came to Norristown and consulted counsel, and when he returned to the bridge he found that it had been practically all removed. What then was he to do? If he had gone to a justice of the peace and lodged information, made complaint, and had a warrant issued for the parties engaged in removing the bridge, would he or would he not, under the circumstances, have been too late? And, if so, the arrest of those persons would not have restored the bridge, but they would have been tried in court, if the matter had been pushed, probably at this time, in the place of these defendants. That would not have resulted, perhaps, in the restoration of the bridge. They might

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have made complaint against the railroad company, and had them indicted, and then that trial might now be taking place, and possibly the result would have been a judgment against the railroad company for the abatement of the nuisance they had created, involving the restoration of the bridge.

But Mr. Roberts, or any other citizen, would have had an equal right to make complaint, and to have had the parties arrested. If the supervisors had filed a bill in equity it would have been in the name of the township, and if the court had granted a preliminary injunction it would have been to prevent the railroad company from removing the bridge; but was it practicable, under the circumstances, for the supervisors to do so? Mr. Duncan went to Mr. Fox, the counsel of the prosecutor, and asked him what he wished him to do. He told him, I believe the evidence is, that he wished him to prevent the removal of the bridge. I am not certain whether he said by injunction or not; I think he did. Mr. Fox was then asked if they (the parties that were moving in the matter, I suppose) would enter into bond; because, before a Judge grants a preliminary injunction, it is his duty, as a general thing, to require security; because a preliminary injunction, if issued immediately, is obtained without a formal hearing of the parties, and only upon the representation of one side, and it must always be a clear case, and security given to indemnify the party against whom the injunction issues for any damages that may be sustained, if in the end it should turn out that the defendants were in the right. Therefore it was a natural question for Mr. Duncan to inquire whether the security would be furnished; because the supervisors, if they had instituted this suit upon their personal responsibility in the name of the township, might have incurred responsibilities for which they naturally would desire to be in some way indemnified.

Then here was Mr. Duncan advised by his counsel that the railroad company had a right to do what they did. Now what ought reasonably to have been expected of him? If he had filed his bill in equity he would have been too late, for the bridge had been removed, and it would not have answered the immediate purpose of restoring public travel. The supervisors, it is said, might have done another thing to restore public travel. They could have graded the road on either side and made a crossing at grade. But the road obstructed was forty feet wide. There was a bank on either side of

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the railroad high enough to support the bridge. There was an embankment, making an approach to the bridge on either side. It would have been no inconsiderable work, therefore, for the supervisors to have graded down the road on either side, and they certainly could not have done it in a few days, because they would have been obliged to find a place to deposit the large amount of earth which would have had to have been removed, and before entering upon so expensive a work it would have been but natural for them to consult the public sentiment in the township as to whether the township would incur the necessary expense.

Now between the time when the written notice was served and the time when this prosecution was begun was five days. What could have been done effectually in five days? What could reasonably have been expected of the supervisors under the circumstances, considering the questions of law involved, and considering the amount of work to be done, either by litigation or by digging away the embankment, before the end could have been effected? A bridge might have been built in place of the bridge removed by the railroad company, but would the township have been willing to incur that expense or run the risk of its being repaid by the railroad company? For it was the railroad company that constructed their road through an excavation across the public highway, and it was their business to build the bridge. And here I have no hesitation in saying that, in my view of the law, the railroad company were not justified in removing the bridge; that, even although another public highway crossed the railroad at a short distance from that point, and although the railroad company laid out a road from the state road which only involved the necessity of going around some ninety odd feet, still the railroad company, in my judgment, was obliged to keep up the bridge on the state road. They could have made a crossing at grade at the other place if they had seen fit. But it obviously is the interest of railroad companies, as well as of the public passing along a highway, that the railroad should not be crossed at grade, for it is not only a danger to the public but a danger to the railroad company itself; and the railroad company had no right, in order that they might save the expense of erecting two bridges, to take away this bridge and transfer it to the other point. But that does not settle the question in this case, because the other facts are to be taken into consideration, to which I have

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already called your attention; and what we are to require of the supervisors is that they should act as prudent men, vigilant in regard to the public highways within their jurisdiction, and prompt in repairing, whenever it occurs, any obstruction in the public highway which may endanger the safety or convenience of the traveling public.

Now, it is for you to decide whether, under all these circumstances, the supervisors acted as prudent men, regardful of their duty, and whether, under the circumstances, more could have been expected of them than what they did. If you believe that they neglected their duties, and that through the instrumentality of that neglect the public are injured, you may convict them. But if you believe that, under all the circumstances, they did no more and left undone no more than what might have been expected of faithful public servants acting in the capacity in which they did, then it would be your duty to acquit them. In regard to the responsibility of one of these supervisors on account of his connection with the Pennsylvania railroad, I have only this to say: that there is no evidence in this case that the railroad company removed this bridge with his knowledge or consent. How long previously he had been out of the state does not appear, and there is no evidence in this case that, while he was acting as a director of the road, the board of directors of the road passed a resolution to remove this bridge, nor any evidence that he was present if it did pass. The Pennsylvania railroad is not the defendant indicted in this case, and the question is whether as supervisors the defendants performed their duty or not.

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Court of Common Pleas of Luzerne County.

HUNT VS. MCCARTNEY ET UX.

The disabilities imposed upon married women by our laws are intended to protect them from importunity and imposition but not to shield them from all the consequences of their own deliberate acts.

In cases of fraud resulting from concealment of the truth, when the truth ought to be made known, a married woman may estop herself from denying the truth of her representations.

EXCEPTIONS to report of referee.

G. W. Kline, Esq., for plaintiff.

George H. Troutman, Esq., for defendant.

The facts fully appear from the opinion of the court delivered September 20, 1886, by WOODWARD, J.

The referee, after hearing all the evidence in this case, has found as matter of fact:

First. That the mortgage in question was duly executed and delivered, and conformed in all respects with the requirements of the law concerning the right of married women to encumber their separate estates.

Secondly. That the mortgage was duly assigned and transferred by the original mortgagee to Henry Dryfoos, and subsequently was again assigned, by the said Dryfoos, to John Hunt, the present plaintiff.

Thirdly. That at and before the purchase of said mortgage by John Hunt, Margaret McCartney, the real party in interest and the owner of the mortgaged premises, stated to him that there was due on said mortgage the sum of three thousand dollars. She urged him to buy the mortgage as a favor to her, stating that she would lose her property unless he did so, as she could not raise the money to pay it. The referee also finds that "the above statements, made by Margaret McCartney, were what induced John Hunt to purchase the mortgage"; and further, that the price paid for the mortgage was the full sum of three thousand dollars."

Fourthly. The seventh finding of fact by the referee is in these words: "That Margaret McCartney agreed to pay seven per cent.

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interest on said mortgage, and did pay for one year (after the assignment) at that rate on three thousand dollars.

Under this state of the facts the referee held that the defendants were estopped from denying the validity of the mortgage, or of the assignment of the mortgage, or the truth of the allegation that three thousand dollars remained due and unpaid. And to these findings the defendants except. We have carefully considered the able argument made by the defendants' counsel in support of the exceptions, but are unable to agree with him that the referee erred in his declaration of the law applicable to the case. The disabilities imposed by law upon married women are intended to protect them from imposition, importunity and fraud; but they do not shield them from all the consequences of their own deliberate and well considered acts, especially when such protection would result in wrong and injustice to others who have dealt with them in good faith. In cases of fraud, whether by concealment or active conduct, a married woman may estop herself to deny the truth of her representation. Bigelow on Estoppel, 488. In McCullock vs. Wilson, 21 Penna., 436, the wife joined the husband in procuring a third person to purchase an invalid mortgage of the wife's separate estate; and it was held that both parties were estopped to deny the validity of the mortgage. In Connolly vs. Brantslor, 3 Bush, 702, it appeared that the wife, at a public sale of land of her husband, announced to the bidders that she would not claim dower against any person who should purchase the premises. She was held estopped from afterwards demanding her dower. We refer also to Drake vs. Glover, 30 Ala., 382. Upon the whole case we are of the opinion that the referee was right.

The exceptions to the report of the referee are overruled, the report is confirmed, and judgment directed accordingly.

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Court of Common Pleas of Montgomery County.

BLANK ET AL. VS. JORDAN ET AL.

In a devise of a life estate to a child, with a proviso that in case such child shall die without leaving issue the said estate "shall go to my *then* surviving children," the word "then" refers to the death of the life tenant, and the remainders to the other children are contingent on their surviving her.

Rules as to construction of wills.

EJECTMENT. Case stated.

Judge Boyer having been of counsel, the case was argued before Judge Mitchell.

M. Evans, Charles Hunsicker and *Thomas H. Speakman, Esqs.*, for plaintiff.

Robert D. Maxwell and *Richard C. Dale, Jr., Esqs.*, for defendants.

The facts fully appear from the opinion of the court delivered December 29, 1886, by MITCHELL, J.

The clause of the will of William Stadelman, which controls this case, is set out in the case stated, and the material part of it is "in case my daughter Elizabeth * * * shall die without leaving issue behind, then * * * the real estate * * * shall go to and be conveyed to my then surviving children, in fee," etc.

The meaning of this is perfectly clear. Both by the common understanding and by the grammatical construction the word "then" refers to the death of Elizabeth. That is the natural meaning, and there is nothing in the context which would justify, much less require, a reference of it to the death of the testator.

It is true that the strict grammatical construction, perhaps even the natural meaning of a single clause, must sometimes give way to the general intent of the will. But this is only to be done on compulsion, when a manifest repugnancy appears between the single clause and a clear and indisputable intent. It is never to be done gratuitously, or to carry out a merely theoretical or supposed general intent. There is no such repugnancy in this will. Even a clear general intent to make equality of distribution among the testator's children would not be sufficient to override a clearly expressed exception; but there is no such intent on the face of this will. There

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are devises and legacies to all the children, but they are specific, of property named, and separate to each child. Whether they were equal in actual value or not there is nothing to show, and they were certainly not equal in legal estate, the sons having clear fees and the daughters only life estates. If we look beyond his children to his remoter descendants there is no sign of equality, for his granddaughter Josephine, instead of getting the share of her deceased father, is left only a pecuniary legacy, smaller in amount than that left to his daughter Elizabeth, and is excluded from the residuary devise, though Elizabeth shares in that in addition to her legacy and her life interest in the real estate involved in the present suit.

The same may be said of the general intent to dispose of his entire estate. A possible intestacy as to a small portion of his estate in the indefinite future would not be sufficient to overturn the plain meaning of his words. The contingency which would produce a partial intestacy may or may not have occurred to him, or occurring to him may have seemed not worth considering. In fact it did not occur till the death of his daughter Ann in 1878, *forty-four* years after his own death. A testator may well be supposed to have thought a possibility so remote not worth providing for.

I have looked through the authorities cited by counsel to see if there was any which required me to deviate from the natural construction of the words in this case. I do not find any. On the contrary, the view I have taken, on general principles, seems to be sustained and required by the very recent and very analogous case of Mergenthaler's Appeal, 15 W. N. C., 441.

Nor do I regard my conclusion as in conflict with the adjudication of the Orphans' Court in Ann Stadelman's Estate (unreported), though part of the language of the opinion in that case may seem to indicate a different view of the will. But when Ann died the possible intestacy as to her share had happened, and distribution was properly made among the heirs of William Stadelman. There were no "then surviving children," and the question in this case was not before the learned judge, nor was his language intended to apply to it.

Judgment for defendant.

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Court of Common Pleas of Northampton County.

JOHN BUZZARD ET AL., ADMINISTRATORS OF R. M. JONES, DEC'D, VS. CHARLES D. NEWHART.

Plaintiffs brought suit before a justice of the peace, and it appeared on the trial that the suit was prematurely brought, the debt not being due, and judgment was rendered in favor of defendant.

After the debt matured a second suit was brought before another justice of the peace, which was also prosecuted to judgment, from which an appeal was taken to the Common Pleas. *Held*, that the prior action was a bar to the second suit, and that there must be judgment in favor of defendant.

SUR MOTION for judgment non obstante veredicto.

Frank Edgar and *W. S. Kirkpatrick, Esqs.*, for motion.

Chase & Mackey, contra.

The opinion of the court was delivered January 3, 1887, by SCHUYLER, P. J.

This is an appeal from the judgment of a justice of the peace. The demand is for a bill of goods amounting to $46.25, sold by the plaintiffs to defendant. Prior to the present suit a similar suit before another justice of the peace had been brought by the same plaintiffs against the same defendant for precisely the same demand. In the first suit both parties appeared and a hearing was had. What took place at the hearing is thus set forth in the transcript: "C. D. Newhart, defendant, is sworn, and claims payment by way of set off, consisting of book account and damages against R. M. Jones, deceased, or his estate. Second—Defendant claims payment to the administrators in part. Third—The debt sued for by the administrators is not due according to the terms of sale. John Slack is sworn for defendant. The ruling upon the last point is that according to the terms of sale the debt sued for is not due, the justice not having jurisdiction, the suit is dismissed at plaintiffs' costs, and so entered day of suit at twenty minutes past four o'clock p. m."

The only question raised by the special verdict is whether these proceedings are a bar to a recovery in the present suit. We think they are. Assuming the fact to be, as it is now conceded to be, that the first suit was prematurely brought, it was the folly of the plain-

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tiffs to proceed further with that suit after that point was made. Having done so and taken the chances of a judgment, they must accept the judgment with all its necessary incidents, one of which is that the judgment "ends the controversy between the parties, subject only to the right of appeal." Gould vs. Crawford, 2 Penna., 92. Having voluntarily placed themselves in this position the plaintiffs are not to be heard to complain that an appeal would have done them no good. All the more important it was to have promptly discontinue the suit, which ought to have been done in a spirit of fairness, without additional incentive, as soon as the error was discovered. But elaboration is unnecessary. We think the present case is ruled by Gould vs. Crawford, *supra*, and on the authority of that case judgment must be entered for defendant. It is proper to say that in our opinion the authorities relied on by the learned counsel for the plaintiffs have no application. They all relate to the conclusiveness of judgments entered in the Common Pleas, which in this aspect stand on a different footing from judgments rendered by justices of the peace.

And now, January 3, 1887, judgment is entered in favor of the defendant *non obstante veredicto.*

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Court of Common Pleas of Montgomery County.

DAVID C. HARRINGTON VS. GEORGE HAMILL, SR.

In an action brought by a tenant against his landlord to recover damages for illness of members of his family, caused, as alleged, by the impure condition of the water upon the premises, which the landlord had represented to be naturally good water, but temporarily corrupted by defective drainage into the well, which the landlord had cleaned out, and the objectionable drainage repaired; *held*, that in order to recover the plaintiff must show to the satisfaction of the jury that the sickness complained of was caused by the unwholesome condition of the water; and that the landlord knowingly deceived plaintiff in his representations concerning the water.

CASE to recover damages.

G. R. Fox & Son, Esqs., for plaintiff.

Charles Hunsicker, Esq., for defendant.

The facts of the case are fully disclosed in the charge of the court delivered September 23, 1886, by BOYER, P. J.

Gentlemen of the Jury—David C. Harrington has brought this suit to recover damages of the defendant for injuries which he says he suffered through the sickness of his family, caused, as he alleges, by the unhealthy condition of the house which he leased from the defendant. There are two branches to this case. One seeks a recovery upon the ground that there was fraud and deception; and the other seeks a recovery upon the ground that there was a warranty that the water upon the premises should be pure. In regard to the first branch of the case it will be for you to inquire whether the defendant knowingly and willfully deceived the plaintiff in regard to his statements concerning the property. If he did, and the plaintiff suffered in consequence, he would be entitled to recover such damages at your hands as the evidence shows he actually sustained. But it would be necessary for you to find that the defendant had willfully deceived him; that he made false representations, knowing them to be false, upon material subjects; and that, as a direct result of this deception, the damages claimed in this case were sustained by the plaintiff.

In regard to the other branch of the case, if there be a warranty in this case that the water should be pure, it would make no difference whether the defendant knew the condition of the water or not. If the water has been proved to be unquestionably impure, and if it has been proved that it caused the sickness, which has been given

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in evidence, in the plaintiff's family, there could be a recovery upon the warranty in another form of action.

Now let us examine the condition of things when the plaintiff rented the property. He visited it; he saw it; he had a conversation with the defendant. He asked him various questions concerning it. They were answered by the defendant, and the defendant explained to him that there was complaint against the water, and that the water had been rendered impure by reason of a defective drain, which caused the overflow from the bath-room and water-closet to be diverted from its proper course and to find its way into the well; but that he intended to have the well pumped out and thoroughly cleaned, and that then, in his judgment, the water would be as pure as it could be desired; that the water was considered good water, as good as any in the neighborhood, or "on the hill" I believe was the expression used. After this conversation, and the personal examination made by the plaintiff of the premises, he leased the property. In that lease there is no warranty against anything, but it is implied in every lease that the property leased shall be in tenantable condition. There were certain repairs which the defendant promised to make, and those repairs I believe it is not disputed were made by him. The drain was not repaired before the plaintiff and his family moved into the house; but they moved into the house about a week before the term commenced, which they asked as a special privilege, and which was conceded to them. Then, before the commencement of the term, the defendant engaged men to make the necessary repairs to the drain, and had the well pumped out, but in consequence of the frozen condition of the ground it is in evidence that it could not be completed until after the first of April; that it was done as soon as, under the circumstances, it could be done, and that the result was that the water from the bath-room and from the sink of the kitchen no longer flowed into the well. The well was pumped out, and the small amount of refuse matter which was found at the bottom was taken out. And the evidence is that although before that the water was impure, that it smelled bad and was offensive, yet that after the well had been cleaned out the water was good to the taste and so continued for a considerable time afterwards; but that when rains occurred a difference was perceptible in the water. Exactly what that difference was, was not very definitely explained. Whether that was due to slop oozing through the ground into the

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well, or matter which had been deposited there during the defective condition of the drains, or whether it was the common result which sometimes follows when rains are abundant, and some surface water finds its way into the well, and the water is found no longer so clear nor perhaps so pleasant to the taste—this is undetermined.

Now to enable the plaintiff to recover upon the ground of deceit it is necessary that you should find that the defendant knew that the water was corrupted, and that it would remain so after the well had been cleaned out. If he did not know it, and only spoke from the best of his knowledge and belief, and only drew an inference from the formerly pure condition of the water, sincerely believing what he represented in regard to it, then he was not guilty of deceit, and there can be no recovery of damages against him on that ground, no matter what the condition of the water was afterwards. If, however, there had been a warranty (and it is maintained in this case that there was) that the water should be pure afterwards, the knowledge of the defendant upon that subject would not have so much to do with it. But was there a warranty, either before or after the lease was executed? The lease itself, as I before remarked, contains no warranty; but is the expression made use of by the defendant in his conversation with Mr. and Mrs. Harrington, that after the well was cleaned out he would guarantee the water would be as good as before, or would be as good as they could desire it. Was that simply an expression of his confidence in the result of cleaning it out, or did he mean to bind himself in the obligation of a warranty that it should be converted into that pure condition? If it was before the execution of the lease, it was omitted from it; if it was after the lease was executed, there seems to have been no further consideration for it. And I am disposed to regard the expression which is said to have been made use of by him as simply an expression of his confidence in the changed condition of the water brought about by the pumping out of the water in the well and the cleaning out of the refuse matter it contained.

I charge you, therefore, gentlemen, that in this case there was no warranty upon which there can be a recovery of damages, and that, if there be a recovery in this case, it must be upon the ground of deceit; and I have already told you that in order to recover damages for deceit the plaintiff must have proved that he was deceived by the defendant knowingly. A tenant is bound to some exercise

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of ordinary care in the use of the premises; and if there was anything out of order with the drain, and the repairs did not answer their purpose, it would have been his duty to complain to his landlord, and to notify him to make it right. Was there anything of that kind done in this case? Was there any notice on the part of the tenant to his landlord that he required him, for the health of the premises, for the health of his family, to do anything upon the ground in the way of ditching or draining? Did the plaintiff himself do anything of that kind and fail?

These are important inquiries; for the inquiry is as to whether there ought to be a recovery of damages in this case for the expense and trouble caused by the sickness which followed in the family. You are not at liberty to infer from the mere fact that members of the plaintiff's family suffered from typhoid fever, that they suffered in consequence of some unhealthy condition of the premises. That must be proved; at least there must be such circumstances in evidence as satisfy you that there is probable cause to think that it was caused in that way. Typhoid fever sometimes occurs when there is no assignable cause. It breaks out sometimes as an epidemic in places where there can be discovered no visible cause for disease. But it is more likely to happen in places where there exists corruption in the water or in the air. In this case, if the defendant is to pay damages, this suffering on the part of the plaintiff's family must to your satisfaction be established by the evidence to have been caused by the condition of these premises, and that the plaintiff was deceived by the defendant in that regard. If you give a verdict for damages you have the right to take into consideration the expenditures and the vexation of mind which was caused to the plaintiff, and the loss of service of the members of his family, and the expenses to which he was put.

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DAVID C. HARRINGTON VS. GEORGE HAMILL, SR.

In an action of trespass on the case for deceit, in which the plea was "not guilty," there can be no recovery upon an alleged warranty; but when a warranty in such an action is averred if laid with a *scienter* it may be given in evidence as part of the deceit practiced.

An adjourned court for the trial of short causes may be lawfully held; and if a party whose case is on such a trial list goes to trial without a protest and exception of record, he is too late to complain after taking his chances for a verdict.

MOTION for new trial.

The case was reported in 3 MONTGOMERY COUNTY LAW REPORTER, page 31.

G. R. Fox & Son, Esqs., for plaintiff.

Charles Hunsicker, Esq., for defendant.

The facts of the case are fully disclosed in the opinion of the court delivered January 17, 1887, by BOYER, P. J.

There are but two reasons filed in support of the motion for a new trial in this case which require special notice. The plaintiff complains of the charge of the court upon the subject of warranty. But in this respect the court treated the plaintiff with more favor than was justified by the form of action and the pleadings filed in the cause. The action is *trespass on the case for deceit*, and the plea is "*not guilty.*" The second count, it is true, alleges a warranty; but lays no *scienter*. There could not of course in such an action be a recovery upon a warranty, even if one existed. A warranty in such an action could only be used to emphasize the deceit; but like any other fraudulent misrepresentation it could only be given in evidence as an element of deceit knowingly practiced by the defendant, and as such the *scienter* of the defendant should have been alleged in that count of the declaration. If a question had been raised upon the pleadings this would have been referred to by the court. But the court treated all the alleged representations of the defendant (that which constituted the alleged warranty included) as if properly laid in the plaintiff's declaration, and referred them all to the jury to find whether there had been any fraudulent misrepresentations made by the defendant by which the plaintiff was deceived. This was the utmost that the plaintiff could ask upon this point in such an action. See Erie City Iron Works vs. Barber & Co., 6 Out., 156.

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There is but one other of the reasons for a new trial which seems to call for any explanation—that which relates to the regularity of the court at which the case was tried.

That court, although termed a special court, because specially designed for the trial of what were supposed to be short cases, in accordance with a practice which prevailed for many years in this district; but it was not technically a special court in the language of the acts of Assembly providing for courts under that designation. It was an *adjourned court* for jury trials. The preceding regular stated term of all the courts was held in June, 1886, commencing the first Monday of that month, and lasting two weeks. At the end of the two weeks the court did not rise, but adjourned to Monday of the next week, the 21st of the same month, which was one of the days fixed by the standing rules of court for the session of the Common Pleas and Orphans' Court; on which day in open court the order for the court to be held in September was made, and the *venire* for the jurors issued; and they were accordingly drawn, and summoned as directed by law; and notice of the court published in all the papers of the county. In the meantime there were several continuations of the June term, invariably by regular adjournment, until the week for jury trials in September was reached.

Ample authority for such an adjourned court is to be found in the act of April 14, 1834, Pur. Dig. 275, 276, pl. 84, 85. The thirty-sixth section of said act declares that "the courts of Common Pleas "of the several counties shall have power respectively to adjourn "the sessions of the court from time to time as they may think pro- "per, and at such adjourned courts to act upon and decide all mat- "ters depending therein with the same effect as they might or could "do at the terms appointed for the holding of such court as afore- "said." (Section 36.)

"It shall be the duty of the president and associate judges "of the several courts of Common Pleas of this commonwealth to "hold adjourned courts of Common Pleas in their respective coun- "ties, in addition to their regular terms, whenever the business of "said courts shall require, so always as not to interfere with their "duties in any of said counties at the terms appointed by law." (Section 30.)

At the time when the order for the September term was made a committee of members of the bar was appointed in open court to

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select from the general list marked for trial a list of short cases to be tried at the September term, a method long practiced by my predecessors on the bench. This was done without objection, and the plaintiff's cases happened to fall among the list set down for the September term; and they were accordingly so placed upon the printed list.

No application was made by the plaintiff to have his case removed from the September trial list before the trial list was called after the court began. A motion was then made by plaintiff to continue the cause upon the ground of the absence of a witness who had not been subpœnaed. The opposite side pressed for trial, and when the case was reached it was ordered on. No protest was then filed against the trial proceeding on the ground that the court had been irregularly called, or the case improperly put upon the trial list. Nor was any exception taken to the action of the court in ordering on the trial.

Having taken his chances for a verdict the plaintiff is too late now to dispute the regularity of the trial.

We have considered the other reasons, but have discovered in them no sufficient reason for a new trial.

And now, January 17, 1887, the motion for a new trial is overruled.

Court of Quarter Sessions of Montgomery County.

Road in Cheltenham Township.

The *termini* of a road laid out or vacated by viewers should be located with exactness. Report set aside because the point of the beginning of the new road, and the vacated portion of the old road, is described with too much uncertainty.

Exceptions to the report of viewers vacating part of Mill road in the township of Cheltenham and laying out a new road.

G. R. Fox & Son, Esqs., for exceptants.

Henry K. Weand, Esq., contra.

The facts are fully disclosed in the opinion of the court delivered February 21, 1887, by Boyer, P. J.

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Road in Cheltenham.

From what appears in the report and draft of the viewers it would seem that the proposed change in the route of this road would be a public improvement by its avoidance of a railroad crossing at grade; and we should be inclined to sustain the report, even though the courses and distances of the vacated portion of the old road are not given, were that part free from all uncertainty, and the point of beginning located with exactness. But in this the report is defective. It describes the vacated portion as "beginning at a point in the middle of the Mill road opposite the south side of the City Line station on the North Pennsylvania railroad." This would be sufficiently precise for a petition; but not for a report which should locate the point with exactness. There may be more than one point in the middle of the road opposite the south side of the City Line station, and the report does not furnish any *data* from which by survey or measurement the precise point selected can be ascertained. Nor do the viewers even say that they have fixed any mark upon the ground. Its locality could have been exactly defined by a measurement and course from one of the corners of the station house. But this has not been done. Nor, if the lines defining the station house are accurately drawn upon the draft, is the point marked thereon as the point of beginning, "opposite to the south side of the station house," but rather opposite the *westerly* side, and on a line with the southerly wall of the station house extended.

Nor does the part of the old road vacated begin at the point described in the report as the beginning of the vacation, but some distance farther on, as shown in the draft, at a point not designated by any defined mark or measurement.

The point where the vacation and new route end is described somewhat vaguely; but perhaps sufficiently to enable the supervisors to ascertain its locality.

And now, February 21, 1887, the report of viewers is set aside.

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Road in Gwynedd and North Wales.

Although in a borough incorporated under the general borough law with authority to lay out streets, the Court of Quarter Sessions has no jurisdiction under the general road law to appoint viewers to lay out a street wholly within the borough limits, it has jurisdiction when the road laid out is only partly within the borough. It may lay out a public road when it traverses a township, and leads into or through a borough.

***Held*, also, that the loca lact of May 9, 1871, P. L. 639, relating to streets in the several boroughs of Montgomery county, does not in such case require the consent of the borough council.**

Exceptions to the report of viewers laying out a public road partly in the township of Gwynedd and partly in the borough of North Wales.

N. D. Tyson, Esq., for exceptant.

Louis M. Childs, Esq., contra.

The facts of the case are fully disclosed in the opinion of the court delivered February 28, 1887, by Boyer, P. J.

The first, second, third and ninth exceptions relate to the jurisdiction of the court, and may be considered together. They deny the jurisdiction of the court because North Wales is a borough incorporated under the general borough law, which vests in the borough council the authority to lay out streets within the limits of the borough; and it has been held that the jurisdiction of the Court of Quarter Sessions to lay out streets in such a borough no longer existed. But in the Somerset and Stoyestown Road, reported in 24 P. F. S., 61, the Supreme Court decided that the borough acts of 1851 and 1856 only repeal so much of the general road law as they supply, and that by streets and alleys "therein" is meant those within the borough limits, and must be confined to such as begin and end within the borough, and does not include such public roads of which a part only are within the borough limits; and that as to such roads there is nothing in either of the borough acts to repeal the general law, or repugnant to it. It was held that in such case to require that as to the part within the borough one proceeding should be followed, and as to so much as lies without another, and different proceeding would be to introduce unnecessary complication; and that, besides, a public road laid out and opened by order of the court under the general road law, and traversing a township, must be presumed necessary for the accommodation of the public at large, and not for the accommodation of the inhabitants of the borough only. The decision in the Somerset and Stoyestown road case was made in 1873, and has been recognized authority and governed the practice ever since.

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But it is contended that by the act of May 9, 1871, P. L. 639, entitled "An act relating to streets in the several boroughs of Montgomery county," the consent of the borough council was made necessary in such a case even if not before. But it will be observed that the act of 1871 operates only upon streets within the limits of a borough and makes no mention of public roads laid out over a part of the county without the borough limits, and leading through or into a borough. The same reasoning which in the Somerset and Stoyestown case induced the Supreme Court to exclude from the operation of the acts of 1851 and 1856 public roads not wholly within the limits of a borough, and to hold that when the road was only partly in the borough the general road law governed, applies with equal force to the case at bar.

The act of 1871 is an enabling act intended to extend the jurisdiction of the Quarter Sessions in cases where it had not jurisdiction before; and where, as in the case of a road laid out through townships, and through or into a borough, it had jurisdiction before, there is nothing in the act of 1871 which shows an intent to take it away. The case relating to the vacation of Osage street, 9 Norris, 114, cited by exceptant's counsel, has no application to the case in hand. That was in the vacation of a street wholly within the limits of the borough of South Bethlehem; for which not only no authority was vested in the Court of Quarter Sessions by the general road law, but was expressly withheld. The case of Norwegian street, 31 P. F. S., 349, cited by exceptant's counsel, is equally inapplicable, and relative to the widening of a street wholly within the limits of the borough of Pottsville.

It will be noted that the borough of North Wales is not an exceptant, although the exceptant is said to be a resident of the borough; and there being no formal mode prescribed by the act of 1871 in which the borough council is to give consent to the jurisdiction of the court, might not such consent be inferred from the acquiescence of the borough authorities in the proceeding, even if their consent were required in such a case? In the case of Norwegian street, *supra*, the local act provided for the submission of the petition to the town council, and their approval "*first*" and expressly prohibited the appointment of viewers until that had been done.

The fourth and fifth exceptions relate to imperfections in the draft, which, however, are not of such a serious nature as to affect

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the validity of the proceeding, and the report itself sufficiently describes the road.

The sixth exception complains that the road as returned by the viewers is laid out partly over an existing road. This, however, may be lawfully done so far as may be necessary to reach the point of ending. In re Road in Springfield Township, 10 Norris, 260; Reserve Township Road, 30 P. F. S., 165; Hess's Mill Road, 9 Harris, 217; Road from the West Chester Road, 2 Rawle, 421.

The seventh and eighth exceptions, which relate to the ending of the road, are not sustained by the facts.

And now, February 28, 1887, the exceptions are dismissed and the report of the viewers confirmed.

Court of Common Pleas of Chester County.

MIDDLETON VS. YERKES.

A contract to furnish insurance as a collateral security, for money borrowed on bond and mortgage, is not performed by furnishing policies of insurance which would not cover the life of the loan.

Not decided, whether, under such a contract, the policy should be a paid-up policy.

It is no defence to an action for commissions for procuring a loan under such a contract, that the money-lender refused to lend on policies which would not cover the life of the loan.

MOTION for a new trial.

H. H. Gilkyson, Esq., for motion.

F. C. Hooton, Esq., contra.

The facts fully appear from the opinion of the court delivered January 3, 1887, by FUTHEY, P. J.

There is only one point which calls for consideration, that relating to the matter of the fire insurance.

The defendant was the owner of houses and lots in Phœnixville, and, desiring a loan thereon, entered into a written agreement with the plaintiff, a conveyancer, by which the plaintiff was to procure for him a loan of $4,500, for a period of five years, at five per cent. interest per annum, and for which the defendant agreed to pay the plaintiff one per cent. for his services—the loan to be secured to the lender by bond and mortgage of the real estate, and "insurance, $4,500, to be given as collateral security." The plaintiff procured the loan, and, with an agent of the lender having the money, met the defendant for the purpose of perfecting the loan. The defend-

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ant, with the bond and mortgage, offered to transfer to the lender, as collateral security, two policies of fire insurance on the houses, in the aggregate for $6,000, in fulfillment of his agreement. On examining the policies it was found that they were five-year policies, but that the time for which the insurance had been effected had nearly expired, and that they had but about four months to run. The owner of the money declined to receive such policies, and none others being offered the loan was not consummated. This suit was then brought to recover the one per cent. for procuring the loan.

We charged the jury that the plaintiff, having procured the money, and having it ready to deliver to the defendant upon his complying with his agreement as to security therefor, it was the duty of the defendant, under the agreement, to furnish insurance policies which should cover the life of the loan, and that, as the defendant declined to give any insurance, except to transfer the policies he held, which had only about four months to run, the failure to perfect the loan was wholly the fault of the defendant; and that the plaintiff, having performed his part of the contract in procuring the loan, was entitled to recover the one per cent. therefor.

We are satisfied that the construction we gave the agreement was right. The loan was to be on real estate, the chief value of which was in the houses, and was to run for five years. The object in requiring an insurance as collateral security is therefore manifest, and the agreement as to insurance could only be fulfilled by giving a policy having at least an equal period to run. It was not a fulfillment of the agreement to tender a transfer of a policy which would expire in four months, leaving the lender with no security during the remainder of the five years except that afforded by the mortgage. The question whether the policy, under the agreement, should be a paid-up policy, does not arise, since no policy of any character was offered except those already mentioned, having but a brief period to run. The policy, we hold, should at least have had a life of five years, if its terms were fulfilled.

It is true, as suggested by the defendant's counsel, that the policy, even if for five years, might be vitiated and rendered worthless in the hands of the holder by a violation of its stipulations. This may be so, but those are risks which the lender impliedly agreed to run. Such risks did not take away his right to have the insurance for what it might be worth to him, if loss by fire should occur.

The rule for a new trial is dismissed.

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Court of Common Pleas of Montgomery County.

PERRY ET AL. VS. PENNSYLVANIA SCHUYLKILL VALLEY R. R. CO.

Appeals from the assessment of damages by viewers appointed under the general railroad law—What is required under the act of April 9, 1856, to perfect an appeal.

Held, that payment of accrued costs, and a recognizance for future costs, as in cases of an appeal from an award of arbitrators, not required in an appeal under the act of 1856.

Held, that after acquiescence by the appellee for more than two years, putting the cause at issue, amending the parties plaintiff, and marking the case for trial at various terms of court, operate as a waiver of the right of the appellee to object to the defective entry of an appeal.

Held, also, that in case of a defective appeal, a rule should in the first instance be taken on the appellant to perfect his appeal within a given time, or in default thereof to have his appeal quashed or stricken off.

MOTION to strike off appeal.

Theo. W. Bean, Esq., for motion.

Charles H. Stinson and *H. K. Weand, Esqs.*, contra.

The facts fully appear from the opinion of the court delivered March 7, 1887, by BOYER, P. J.

This is a motion to strike off the appeal of defendants from the award of damages by viewers appointed by the court under the general railroad law of the state. The complaint is that the appeal is defective, not being in conformity to the mode of appeal prescribed in the case of an appeal from an award of arbitrators, no payment of costs having been made by appellant and no recognizance filed with surety for costs likely to accrue.

The rule of this court upon the subject of appeals from reports of juries awarding damages for taking land under the right of eminent domain is as follows: "In the several courts in all cases of re-"ports of juries assessing damages under the right of eminent do-"main, the owner, occupier, or other person entitled to damages, or "the county, or other party entitled to appeal, may enter an appeal "from such assessment within thirty days after the filing of the re-"port; or in cases of county roads from the award of the opening "order; and where such appeal is entered all exceptions shall be "dismissed of course. Such appeal shall be signed by the party "appellant, his agent or attorney, and must be accompanied by an "affidavit of the party appellant, his agent or attorney, that the same "is not taken for the purpose of delay but because the affiant firmly "believes injustice has been done."

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The appellants in this case filed their appeal in compliance with this rule of court, accompanied by the prescribed affidavit. But the appellees contend that this is not sufficient; and assail the validity of the appeal upon the ground that, as in an appeal from the award of arbitrators, the accrued costs should have been paid, and security given for the costs thereafter to accrue.

Of course the acts of Assembly are paramount to rules of court, and if by act of Assembly anything is directed to be done to perfect such an appeal, in addition to what is mentioned in the rule of court, the statute must be obeyed.

The defendants were incorporated under the general railroad law embraced in the act of February 19, 1849, and its supplements. The act of 1849 provided for an assessment of damages by a jury of viewers, but provided for no appeal from their assessment. The act of April 27, 1855, P. L. 365, provided for an appeal, but was silent as to the manner. Then followed the act of April 9, 1856, supplementary to the act of 1849, which in its third section (see P. D. 1425, pl. 50) provided for an appeal in the following words: "And "upon the report of said viewers, or any four of them, filed in court, "either party within thirty days thereafter may file his, her or their "appeal from said report to said court." No direction is given by the act as to the manner of the appeal, except that it shall be filed. But further on the same section provides that "the said court shall "have power to order what notices shall be given connected with "any part of the proceedings, *and may make all such orders con-* "*nected with the same as may be deemed requisite.*" This would seem to imply that the court had the authority to regulate the manner of appeal. If so, what would be a reasonable regulation to adopt? The second section of the same act provides that when there was a failure to agree with the land-owner upon the amount of compensation for the property proposed to be taken, the railroad company shall tender a bond with sufficient surety for the payment of all damages, and in case of non-acceptance of the bond tendered the bond given shall be subject to the approval of the court. The act of July 15, 1842, P. D. 1426, pl. 57, had provided that "in all "cases for the assessment of damages caused by the construction of "canals or railroads by incorporated companies in this common- "wealth, if the viewers or a jury shall find for the plaintiff any sum "of damages, such award or verdict *on the rendition of judgment*

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"shall carry costs, unless there may be some provision in the act "incorporating such company to the contrary." And the act of February 19, 1849, P. D. 1425, also provides that "if *any* damages be awarded," etc., the costs and expenses shall be defrayed by the said railroad company.

It will be seen, therefore, that the damages and costs are secured to the plaintiff in such a case by the preliminary bond. Why should the costs be further secured by an additional bond? And why should costs accrued at the time of the appeal be paid by the appealing party, when, by the terms of the act just quoted, costs are made payable only *"on the rendition of judgment"?* And upon an appeal there can be no judgment until after verdict. The mode of appeal must of course be applicable to both parties. In case the land-owner appeals, and the arbitration law applies, he too must pay the accrued costs, and give security to pay future costs; although, as we have seen, the railroad company is bound to pay all costs if any damages be awarded: the land-owner being only liable for costs unless the jury should decide that the railroad company is entitled to take his land without paying any damage—a contingency practically too remote to be considered. All that seems necessary for the further protection of the appellee is that the appellant should make oath or affirmation that the appeal is not for the purpose of delay but because the appellant firmly believes that injustice has been done. This our rule of court requires, and the appellants have complied.

It is not pretended that there is any act of Assembly which expressly directs an appeal in such cases to be made in conformity to an appeal from an award of arbitrators; but the act of March 22, 1817 (P. D. 354, pl. 92), has been cited as applicable, the sixth section of which provides that "in cases in which a corporation shall "be a party to any suit in any court, or before any magistrate, all "proceedings except as regulated by this act shall be the same as "directed by law in other similar cases." Doubtless this act applies to corporations appealing from an award of arbitrators; when they must pay costs, and give bail as individuals are required to do in similar cases. But the real question remains whether in an appeal from an assessment of damages by viewers under the act of 1856, either individuals or corporations are bound to pay costs and enter into recognizance.

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The act of 1817 was passed long before any railroad law, general or special, was enacted in Pennsylvania, and before any railroad existed in the state. It refers to "*suits*" in which a corporation is a party; and the whole context of the act shows that it contemplated "*suits*" brought into court by summons in the ordinary form of an action at law. It is said that in the decision of the Supreme Court in the Schuylkill Navigation Company vs. Kittera, 2 Rawle, 438 (decided in 1830), the act of 1817 was construed to apply to appeals from the assessment of damages against corporations. But this is not accurate, as in that case the point turned upon the construction of the eleventh section of the act of March 8, 1815, incorporating the navigation company, which provided that an appeal from an assessment of damages should be taken in the manner "in which appeals are allowed *in other cases*"; a somewhat vague expression, but naturally assimilated with the manner of appeals from an award of arbitrators as nearest in character. In the case of the Schuylkill Navigation Company vs. Thomas, 13 S. and R., 43 (decided in 1826), however, the language of the opinion delivered does, it must be confessed, recognize the application of the act of 1817 to such an appeal made by a corporation at that period. That case, however, was in the form of an amicable "suit," and therefore answering to the term used in the act of 1817.

But the case of the same corporation against Jacobs, decided at the same time and reported with it, was a proceeding begun by petition, and was an appeal from the assessment of damages by viewers appointed by the court; and the language of the opinion and the decision apply to both cases. But as it appeared in the later case of the Navigation Company vs. Kittera, *supra*, the real basis of the decision was the clause contained in the special act of 1815, under which that company was incorporated and the mode of appeal directed. In the latter case the same question is decided, but based solely upon the charter act of the company, without any reference to the act of 1817. Since the general railroad law was adopted there has been no decision of the Supreme Court upon this point. Before that the special charters of railroad companies provided for the assessment of damages in each case; and the mode provided varied in the different charters, until the general law was passed applicable to all railroads incorporated thereunder.

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Three cases have been cited of rulings on this subject by subordinate courts; the first of which, Seal vs. N. C. R. R. Co., 1 Pearson, 108, was a case determined before the act of 1856 providing for appeals was passed; and in which the point did not arise for decision, being upon exceptions to set aside the report of viewers for awarding excessive damages; and the remarks of Judge Pearson were merely advisory of a safe mode of appeal.

The next case is that of DeLong vs. Allentown R. R. Co., 1 Woodward's Decisions, 191. In that case also the point was not directly before the court for decision, the appeal having been actually made as if from an award of arbitrators, and the only disputed point being whether it was in conformity to the law regulating that mode of appeal. The effect of the act of 1856 was not considered, nor the question raised.

The point involved in this case, however, was directly before the court in the late case of Deisher vs. Reading and Pottsville R. R. Co., reported in the *Miners' Journal* of November 2, 1855, in which Judge Green, of Schuylkill county, struck off the appeal because no costs were paid nor recognizance filed. The learned Judge cites as the basis of his decision the cases which have been mentioned and considered, the only one of which, however, which was decided since the act of 1856 was passed was that of De Long vs. Allentown R. R. Co., before mentioned, in which the effect of that act was not argued or considered. If it had been considered and construed, the opinion of so eminent a jurist as Judge Woodward would be entitled to great weight.

In the absence of any construction by the Supreme Court of the act of 1856 in its provisions for an appeal, I consider the question an open one; and in my judgment the third section of that act, already quoted, prescribes with sufficient clearness how the appeal from the report of viewers assessing railroad damages is to be made, and is complete in itself independently of any other act. Seeing that before that stage of the proceedings could be reached the damages and costs had already been secured to the land-owner under the provisions of then existing acts, the Legislature simply prescribed that the appeal should be filed within thirty days from the filing of the report of the viewers, and empowered the court to make all such orders connected with the proceedings as it might deem requisite. This defined all that was necessary in view of the new

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system securing the damages and costs to the land-owner, payable on the rendition of judgment in his favor; and needs no forced association with any former act. Impressed with this view of the law as it now stands I am unable to agree with the conclusion of Judge Green, in Deisher vs. Reading and Pottsville R. R. Co., that the appeal should have been made in all respects as if from an award of arbitrators.

But there is another ground upon which this motion must be overruled, even if the appeal were defective in form. The plaintiffs are too late in their application. The report of the viewers was filed in court October 1, 1884. The appeal was taken October 25, 1884. The motion to strike off was not made until November 22, 1886, more than two years after the appeal. In the meantime the case was put at issue, and marked for trial by the plaintiffs at six different terms of court. More than a year after the appeal was filed the plaintiffs moved to amend the parties plaintiff in the suit; which was allowed. Were there nothing else to defeat the present motion but the acts of the plaintiffs, and their acquiescence during so long a period, it would be sufficient. Even assuming the position of the plaintiffs in regard to the irregularities of the appeal to be correct; having neglected to apply for a rule on the defendants to perfect their appeal in the first instance; and having put the cause at issue, amended the parties of record; and repeatedly marked the case for trial at various terms of court, thus compelling the defendants on different occasions to prepare for trial,—they must be held to have waived their right to object to the manner of the appeal, as they have in effect admitted the defendants to be properly in court thereupon. This principle has been established by the Supreme Court in a series of cases relating to defective appeals from the award of arbitrators. See Clark vs. McAnult, 3 S. and R., 354; Cameron vs. Montgomery, 13 S. and R., 123; Brown vs. Jones, 7 Watts, 433; Wilson vs. Kelley, 2 W. N. C., 482; Wetter vs. Kiley, 14 Norris, 461.

So also in regard to appeals from justices of the peace. See Cavence vs. Butler, 6 Binney, 52; Delaware and Hudson Canal Co. vs. Loftus, 21 P. F. S., 418; Craig vs. Brown, 12 Wright, 202; Rhey vs. Baird, 1 P. F. S., 86; Burgess, &c., of Huntingdon vs. Jackson, 2 P. and W., 431; Shank vs. Warpel, Adm'r, 14 S. and R., 205; Cochran vs. Parker, 6 S. and R., 549; Sleck vs. King, 3 Barr, 211; Marks vs. Swearingen, 3 Barr, 454.

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The same has been held in regard to appeals to the Supreme Court. See Heckert's Appeal, 13 S. and R., 102.

The Supreme Court of our state have favored the privilege of appeal as a valuable right which is not to be denied for formal defects without the opportunity of amendment, after due notice. They have, therefore, held that in case of a defective appeal from an award of arbitrators or a justice of the peace, the party in default should be called on to perfect his appeal within a given period, or in default thereof to have his appeal dismissed, and that the court ought not to dismiss the appeal in the first instance. See Means vs. Trout, 16 S. and R., 349; Burgess, &c., of Huntingdon vs. Jackson, 2 P. and W., 431.

If, therefore, the appeal in question is to be likened to an appeal from an award of arbitrators, the same reasoning applies for like treatment.

And now, March 7, 1887, the motion to strike off the appeal is overruled.

Court of Quarter Sessions of Chester County.

In re Street in Downingtown.

Where a borough is incorporated under the general borough law the Court of Quarter Sessions has no jurisdiction under the general road law to appoint viewers to lay out a street or road wholly in the borough. The authority to lay out such streets and roads is given to the borough authorities.

But where one of the termini of a road is beyond the limits of a borough the court has jurisdiction under the general road law to lay out a road, although a part thereof may be within the limits of a borough. And so if a road passes through a borough, having both termini beyond its limits.

Any person aggrieved by any regulation of the borough authorities in laying out, widening or straightening streets, may apply to the court for relief, who may obtain the necessary information by views and reviews.

As to assessing damages, and where boroughs have special laws on the subject of laying out streets in boroughs.

W. B. Waddell, Esq., for petitioners.

R. J. Monaghan and *J. Frank E. Hause, Esqs.*, contra.

The facts appear in the opinion of the court, which was delivered December 13, 1886, by FUTHEY, P. J.

This is a petition to the court by citizens of the borough of Downingtown, stating that they suffer inconvenience for want of a

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street or alley in said borough between certain points named, and asking the court to appoint proper persons to view the ground proposed for said street or alley, and to lay out the same according to law.

This petition is presented in accordance with the practice of the court under the act of March 18, 1868 (P. L. 352), relating to roads and streets in Chester county. That act, however, having been declared unconstitutional by the Supreme Court (Road in Phœnixville, 2 Chester County Reports, 433; s. c., 43 Leg. Int., 313), we can no longer proceed thereunder.

The borough of Downingtown is subject to the provisions of the general borough act of 1851 and its supplements of April 22, 1856, and May 22, 1883, and therefore proceedings to lay out and open streets which are wholly within the limits of the borough must be in accordance with the provisions of those acts.

It is clear that the Court of Quarter Sessions has no authority to lay out streets which are wholly in such boroughs. This has been so declared by the courts in a number of cases, and must be considered as settled law. Alley in Kutztown, 2 Woodward's Decisions, 373; Somerset and Stoystown Road, 24 P. F. S., 61; South Chester Road, 30 P. F. S., 370; In re Pine Street, 2 York Legal Record, 5; Road in Phœnixville, *supra*.

The acts in question provide all the necessary machinery for laying out and opening roads situated wholly within boroughs which are subject thereto, and for the assessment of damages, and the provisions thereof must be followed. The borough authorities are invested with power to survey, lay out, enact and ordain such streets, roads, lanes, alleys, etc., as they may deem necessary, and to provide for, enact and ordain the widening and straightening of the same, and are given all needful jurisdiction. The duty is therefore wholly devolved upon the proper borough authorities to ordain and lay out streets as they may be needed, and the court has no authority to lay out streets in the manner used in the case of ordinary public roads, unless authorized by special acts of Assembly.

In order that the rights of citizens may be protected against the oppressive action of the corporation, it is provided that any citizen aggrieved by any regulation in relation to the laying out, widening or straightening of any road, street, lane or alley, shall have the right to apply to the Court of Quarter Sessions for relief, who shall

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make such order as shall be just and reasonable, and it has been determined that this extends to the act of the authorities in vacating any street. In re Orange Street, 9 Norris, 114. Unless there is such application for relief, the authority of the court is not needed to perfect or render valid the laying or vacating of a street. The court, in obtaining the necessary information to enable it to make such order, may appoint juries of view and review, who shall have due reference to the town plot and to the general arrangement, plan, convenience and advantage of the borough. In re Orange Street, *supra.*

When the borough authorities have ordained and laid out a street under the power given them by the borough acts, while it is by such action a lawful street without more, they have no right to enter upon the lands through which it passes and open the same for public use without having the damages liquidated. The act of 1856 furnishes the necessary machinery for this purpose. It provides that when the burgesses and town council of any borough shall open or be about to open any streets or alleys therein, etc., it shall be lawful for them to apply to the Court of Quarter Sessions, setting forth the facts and describing the locality of such streets or alleys, and thereupon the court shall appoint seven disinterested freeholders of such borough to assess the damages, make assessments for contribution upon properties benefited, etc., and report to the court. If the land-owners will release all damages, then there is no occasion to apply to the court for viewers to make such assessments; and the street, upon such release being given, may be opened without further action than that taken by the borough authorities in ordaining and laying out the same.

When a petition is presented to the court for the appointment of viewers to assess damages, etc., the petition should fully and accurately describe the street ordained and laid out, and a draft should be attached either to the petition or to the report of the viewers.

What we have said refers to streets which are wholly within a borough. When the road is not wholly in a borough, but one of its termini is beyond the limits of the borough, the Court of Quarter Sessions has jurisdiction under the general road law to lay out roads, even although a part thereof may be within the limits of a borough. And so, if a road passes through a borough, having both termini beyond its limits. As to such roads there is nothing in the

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acts relating to roads in boroughs which repeals the general law or is repugnant to it. Somerset and Stoystown Road, *supra;* Road in Chester and South Chester, 2 Chester County Reports, 438.

As the proposed street or alley is wholly within the borough of Downingtown, the petition of citizens for a jury to lay out the same is dismissed.

What we have said does not apply to the borough of West Chester, which is not under or subject to the general borough law, nor to one or more of the other boroughs of the county where the laying out of streets or roads and the assessment of damages is governed by special acts of Assembly.

(See Road in Gwynedd and North Wales, *supra*, 39.)

Orphans' Court of Montgomery County.

Estate of Samuel Williams, Dec'd.

A guardian agreed under seal with the father of his ward that the father should assume the responsibility of managing the estate, and the guardian should charge no commission. The guardian received moneys, satisfied mortgages, drew checks for investment, etc., under the management and supervision of the ward's father. *Held* under the circumstances of this case no commission or compensation could be allowed the guardian, although his actual expenses were allowed.

Exceptions to report of auditor.

J. P. Hale Jenkins, Esq., for guardian.

Henry C. Boyer and *Edward Haugh, Esqs.*, for surety, the father of ward.

The facts fully appear from the opinion of the court delivered March 21, 1887, by Boyer, P. J.

There are two sets of exceptions to this report, one set filed in behalf of the wards and another in behalf of the accountant. The former except to the credit allowed to the accountant for the sum of $262.11 claimed to have been expended by him in attending to the business of the trust. These expenses have not been itemized, nor proved in detail; but the accountant has stated under affirmation before the auditor that according to the best of his knowledge and belief they, in the aggregate, amounted to that sum. Some

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allowance must be made for the fact that these expenses extended through a period of over twenty years, and consisted of comparatively small items, and generally of a character which made it inconvenient or practically impossible to obtain written vouchers for the same; although, it is true, a more satisfactory memorandum might have been kept by the accountant. But when we consider that the accountant had bound himself by a written agreement to charge no commissions as guardian, there seems to be less room for the exercise of a rigid scrutiny in estimating and allowing his expenses than would be justified in an ordinary case. I am therefore inclined to the opinion that the allowance of this item by the auditor, under the circumstances, was proper.

I am also of opinion that the circumstances justified the auditor in directing the expenses of the audit to be paid out of the trust estate.

The most material exceptions filed on either side relate to the effect of the agreement executed by the accountant in 1864, and the question whether thereunder he can enforce his claim for commissions upon the trust fund, or any portion of it, as compensation for his services or responsibility as guardian; and, if so, for what amount.

The agreement is under seal, and its execution admitted. It appears by the terms of the agreement that Charles Williams, father of the wards, was to assume the collection and investment of all moneys belonging to the minors, and protect the guardian from all responsibility in the management of the same; and he became the surety of the guardian of record for the faithful execution of the trust. The agreement further stipulated that no commissions should be charged by the said guardian, his executors or administrators. It then provides as follows: "Except in the event of the decease of "the said Charles, and the actual performance of the trust devolves "on him or his representatives, then to be allowed to charge com- "missions on the funds which may at the time be in their trust. It "is further agreed and distinctly understood that the said represent- "atives shall not charge, under any plea or circumstances, more "than two per cent. commissions." These are the words of the written agreement. The contingency mentioned in which commissions were to be allowed never happened, Charles Williams being still in active life.

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But it is said that notwithstanding this agreement the accountant did perform some active duties connected with the trust; and that he is therefore released from his obligation to charge no commissions. It is in evidence that moneys of the wards were paid to him, and by him deposited in bank in his name as guardian; that petitions to court were presented signed by him as guardian; that he personally entered satisfaction as guardian upon mortgages when paid off; that he signed the necessary papers for the change and transfer of securities; that there was conveyed to him as guardian in trust the title to certain real estate for the benefit of the minors, being part of the estate of their grandfather to which the wards were entitled, and which by common consent it was agreed should be conveyed to them unconverted; and also that he occasionally visited and inspected properties in which investments of the trust funds were about to be secured; and, finally, that he was compelled to file an account.

For these services, and for the responsibility incident to his position, the auditor, although recognizing the binding effect of his agreement, as recited, has allowed him as compensation the sum of $1,050, the same being equivalent to a commission of one and one-half per cent. upon the principal sum of the entire trust fund.

But all these services, except the personal inspection of properties offered as security for investments, fell necessarily within the scope of the duties of even a nominal guardian, in whose name the estates of the minors were held; and must have been anticipated by him when he assumed that position, and agreed to serve without commissions. The executors of the grandfather, from whom the minors derived all their estate, were obliged to settle formally with the guardian, for he alone could give them lawful acquittances. The trust funds deposited in his name had to be drawn out of bank upon his checks as they were needed for investment. In his name the investments had to be made and the securities received; and when paid off, he, either in person or by power of attorney, could alone enter satisfaction; and to effect a final settlement of record he was the only proper accountant. All these requirements, together with the responsibility incident to this position, he must have known when he assumed the office of guardian. There is no evidence to show that circumstances arose which made it necessary for the guardian to perform services or incur responsibilities not contemplated

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or implied in his agreement. If he personally inspected properties to ascertain their security for a proposed investment there is no proof that he was compelled to do so because of any neglect of Charles Williams in that regard, or from any other necessity; or that such acts on his part were not purely voluntary and gratuitous. The evidence is that Joseph and Charles Williams were not only relatives but associated together intimately in mutual friendship and confidence. Such an arrangement as that made between them was not unnatural considering their relations, and that both were then in prosperous circumstances. Nor is it perhaps unnatural now, since the circumstances of Joseph T. Williams have undergone a change, that he should repent the bargain he then made and seek to recover what he can. But his contract is clear, and stands unaltered. We can not see that there is any distinction to be made, as suggested by the auditor, between "commissions" and "compensation." Commissions on a trust fund are allowed only as a compensation for the responsibility and trouble involved, and when a trustee surrenders his commissions he thereby surrenders his compensation. Upon this understanding these parties seem to have acted throughout, for there was at no time any deduction allowed or claimed from any of the funds over which the accountant had temporary control. All were passed over for investment.

It is impossible, therefore, to escape the conclusion that the accountant is not entitled now to have paid back to him out of the trust estates any sum as commissions or compensation. The third exception, filed by Annie W. Lloyd and others, is therefore sustained; and the report of the auditor is reversed as to the sum of $1,050 allowed to the accountant as "compensation."

It follows from this that the first five exceptions filed in behalf of the accountant are not sustained.

Nor is accountant's sixth exception sustained. For, although the counsel of accountant may fairly be entitled to a larger compensation from his client than that allowed him by the auditor, the services rendered in behalf of the accountant against the estates of the wards ought not to be wholly charged against the latter.

The seventh exception of the accountant is sustained; and the decree recommended by the auditor modified, so as to read as follows: It is ordered and decreed that upon the payment or tender to him (the said Joseph T. Williams) of the sum of $115, being the

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amount of the costs and expenses incurred by him and allowed, not covered by the assets in his hands, he shall execute and deliver unto his late wards (now all of age), or to any person duly authorized by them to receive the same, a deed of conveyance in fee simple for all the real estate held in his name as guardian for their benefit, which said deed of conveyance shall be prepared at the expense of said intended grantees, and in their behalf tendered to the said Joseph T. Williams for execution and acknowledgment; and upon the proper execution and delivery thereof the said grantees shall deliver to the said Joseph T. Williams duly executed releases in full discharge of him as guardian from all further account or liability.

All the exceptions on either side not herein specially mentioned, and disposed of, are dismissed.

Court of Common Pleas of Bucks County.

In re Application for Charter for the Solebury Mutual Protective Society.

The purpose of the proposed corporation was stated to be: "The recovery of property that may be stolen from its members; and in the event of a failure to recover such property, to pay to the loser such part of the value thereof as the company may hereafter determine and set forth in its by-laws. If a member may meet with loss for which the company is liable, and the property shall not be found and returned to the owner, a tax sufficient to raise the required amount shall be assessed equally upon the members." *Held* that the corporation was an insurance company for profit, and could only be chartered by the state.

It is against public policy to charter such a company unless, among its duties, is included that of detecting and arresting the thieves.

Petition for charter.

H. B. Eastburn, Esq., for petition.

The facts are fully stated in the opinion of the court delivered January 6, 1885, by Yerkes, P. J.

The petition states the purpose of the proposed corporation, as follows: "The recovery of property that may be stolen from its members; and in the event of a failure to recover such property, to pay to the loser such part of the value thereof as the company may hereafter determine and set forth in its by-laws. If a member may meet

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with loss for which the company is liable, and the property shall not be found and returned to the owner, a tax sufficient to raise the required amount shall be assessed equally upon the members."

We are urged to incorporate the petitioners as a corporation of the first class, under clause 9, section 2, of the act of April 29, 1874, which authorizes the grant of a charter "for the maintenance of a society for beneficial or protective purposes to its members, from funds collected therein."

The act divides corporations, authorized by it, into two classes: first, "for profit"; second, "not for profit." The application must be confined to only one of these classes, and must so far specify the objects of the association as to clearly satisfy us that they fall within the meaning of the law and class under which we have jurisdiction; if it appear that the object is provided for under the other class, we must reject it. The intention of the Legislature was to draw a distinct line between the jurisdiction of the court and the state officers in the matter of granting charters, which is defined by the character of the corporation. When it is clear that the objects of the charter place it within one jurisdiction, the presumption is that the other is excluded.

The same general idea of benevolent encouragement and support of beneficial and social unions runs through the entire list of "corporations not for profit." The act does not contemplate that profit, business advantages and insurance from loss of property are to be secured by the formation of companies of the first class, but all corporations for such purposes are grouped together in the different clauses of section second, under the head of "corporations for profit." This is the scheme of the General Corporation act of 1874.

The ultimate design of the proposed corporation is the insurance of its members, upon the mutual plan, from loss arising from the theft of property not returned to the owner. If we approve of the charter, it will be in the power of the corporation to guarantee to its members the full value of the risk simply by adopting a by-law so providing. It is mere insurance; a contract to compensate the insured if he shall suffer loss, the amount to be determined upon investigation of the loss upon the happening of the contingency contemplated in the contract. The paragraph in the second article, providing for compensation to the loser of such part of the value of the property as the company may hereafter determine and set forth in

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its by-laws, is the Trojan horse by means of which a full-fledged and unrestricted insurance company is to be introduced, to fill out the skeleton which we are asked to set up as a society for beneficial and protective purposes to its members, not for profit.

The purpose of the proposed charter is included in, and covered by, clause three of section second, "corporations for profit," viz.: "For the prevention and punishment of theft or willful injuries to property, and *insurance against such risks.*" It may be said that the prevention and punishment of theft are not included in the proposed charter, and therefore, although insurance against the risk of loss by theft is the object, the application does not come under the provisions of this entire clause. But that is the fault of the draughtsman and not of the law.

The third section of the act requires the Judge to peruse and examine the instrument, and if it shall appear to be within the purposes of the first class, lawful and not injurious to the community, to approve the same.

If the object of the petitioners be to obtain the benefits of a corporation for insurance against risks arising through theft and to evade the healthful public purposes of the third clause of the second class, to wit, the prevention and punishment of theft, we can not sanction it as beneficial or protective. In fact, we can conceive of nothing more injurious to the community than the creation of a corporation with purposes limited to the recovery of or payment for stolen property, without any avowed purpose to punish the perpetrators of crime. The court would be placed in the attitude of incorporating a society the object of which would be a return of stolen property to the owner at the expense to the public of permitting a thief to escape punishment.

It would be construed an invitation to the worst classes to prey upon the community which fostered a corporate organization with powers extending no farther than to recover property stolen from its members, or reimburse them for the loss, regardless of the apprehension and punishment of the thieves. Under the proposed charter the company would not be authorized to assess its members to pay a reward for the arrest of a horse-thief, nor to bear the expenses of his prosecution in the criminal courts. We do not believe the petitioners themselves intend to form such an easy-going corporation or that they would be content with such a charter. The pro-

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posal does violence to our notions of the old-fashioned horse companies, organized for the "pursuit of horse-thieves and other villains."

The intent of clause three, of the second class, in coupling the right to insure with the duty of protection to the public by preventing and punishing theft, is plain. And unless the proposed charter includes the obligation to discharge those duties, the policy and intent of the law forbid an incorporation.

Inasmuch as corporations of the second class, of the act of 1874, are not within our jurisdiction, it follows that, as we believe this application to be within that class, it is unnecessary for us to decide whether, in respect to such a corporation, the act of 1874 has been superseded by the insurance law of 1876. But it seems to us that the fifth section of the latter act has repealed the insurance clause of the act of 1874, and we do not think that an insurance, such as this charter seems to contemplate, is excepted from the operation of the repealing act by the fifty-fourth section thereof. It may be questioned whether the exception applies to corporations other than those then in being. Here, under the proposed power to fix the amount of insurance by a by-law, it could be reduced to a fixed and guaranteed sum, with a liability upon the members to taxation for its payment. The issuing of a written policy would be but a formality. A certificate of membership would answer the purpose. A liability would exist upon a mere verbal contract.

And now, to wit, January 6, 1885, having perused the proposed charter, we refuse our approval.

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Court of Common Pleas of Luzerne County.

GOODWIN VS. J. D. COOPER ET AL.

Where a vendor has conveyed with covenants on which he would be liable to the vendee in damages for defect of title, the vendee may detain purchase money to the extent to which he would be entitled to recover damages.

A vendee is not entitled, by virtue of the covenant implied from the words "grant, bargain and sell," or of general warranty, to defalk from the purchase money damages on account of a public traveled road, and a railroad company's right of way across the land, which had been in use for years before his purchase.

Where a vendor conveys by established land-marks the subject of the grant will neither overrun nor fall short of them. They form the true boundary, and the courses and distances serve but to point towards the place.

On a rule to open a judgment it is the duty of the court to weigh the testimony, even though it be conflicting, and to refuse to award an issue if satisfied that the defence could not prevail if submitted to a jury.

RULE to open judgment.

George K. Powell, Esq., for plaintiff.

E. G. Butler, Esq, for defendant.

The facts fully appear from the opinion of the court delivered December 11, 1886, by RICE, P. J.

"The detention of purchase money on account of the breaches of the vendor's covenant is a mode of defence that is peculiar to our Pennsylvania jurisprudence, but the principle is well settled with us that where a vendor has conveyed with covenants on which he would be liable to the vendee in damages for a defect of title, the vendee may detain purchase money to the extent to which he would be entitled to recover damages on the contract." Wilson vs. Cochran, 10 Wr., 229. It is upon this equitable principle that the defendants asked to have this judgment opened. The judgment was given for purchase money for certain land which Abram Goodwin, deceased, the original plaintiff, conveyed to J. D. Cooper, one of the defendants, by deed containing the terms "grant, bargain and sell," and a covenant of general warranty. The Lackawanna and Bloomsburg Railroad Company's right of way crossed the land, and has been in use by the company twenty-six or twenty-seven years; there is also a public traveled road across the land, which has been in use for a much longer period of time. It is hardly necessary to say that the existence of these easements does not constitute a breach either of the express or the implied covenants. The late case of Ake vs. Mason, 12 W. N. C., 210, affirms the doctrine held in Patterson vs. Arthurs, 9 W., 152, and kindred cases, on this subject.

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The other branch of the defence rests on the alleged want of title in the vendor to a small corner at the rear end of the lot, containing about one hundred and one perches. This is in the possession of the Delaware and Hudson Canal Company, whose title, so far as the evidence shows, depends on the statute of limitations. Their title, however, is not denied. The plaintiff's contention is that upon a fair construction of the deed to the defendants it will be found that the disputed piece was not embraced therein. The land is described in the deed as containing twenty acres, more or less, and it is not denied that the land which the defendants actually got exceeded that quantity. It is not shown, however, that the sale was made on the basis of that number of acres, and hence the defendants were entitled to all embraced within the true boundaries of their deed, although there may be an excess in the number of acres. Riddle vs. Foster, 8 C., 167.

The land is first described as the tract which was patented to Darius Williams by patent dated January 9, 1812. This patent calls for a road having the single course, south, forty-two and one-half degrees west, as the boundary line at the back end of the lot. The description in the deed of this line is, "thence along a road south, forty-two and a half degrees west, thirty-eight perches to a corner." It appears that the road, as opened and used for a great number of years, and which was fenced on both sides, does not exactly correspond with the road as laid down on the map of the official survey of the Darius Williams tract. It would seem that the present line substantially corresponds with the line of this old road as it was opened, used, and fenced. For a portion of the distance it includes the whole of the road, and the lower corner, which, it would seem from the testimony, has been marked for a period of over thirty years at least, is about in the middle of the road. If, therefore, the course of the road as it was actually used and fenced, and as it was marked by monuments which still remained upon the ground, is to govern, then the defendants got all the land which the deed was intended to convey, and their defence has failed. But if the course of the road as laid down on the map of the official survey of the Darius Williams tract is to control, then it would seem that there was a failure of title to the small corner spoken of, on account of which the defendants would be entitled to detain the purchase money still unpaid to the amount of their damages.

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Had this old road been in use at the time of the conveyance there would have been little room for argument that it was not the true boundary, although it might not have agreed in its course with the course of the line mentioned and given in the deed. When a vendor conveys by established land-marks the subject of the grant will neither overrun nor fall short of them. They form the true boundary, and the courses and distances serve but to point towards the place. Lodge vs. Barnett, 10 Wr., 477–484; Cox vs. Couch, 8 Barr, 147. But we do not think that the fact that the road had been abandoned as such changes the rule of law. Its location was still visibly marked upon the ground and corresponded with the line of the tract as marked by visible monuments. It was a boundary which the parties could see, and with reference to which they could contract without the aid of a surveyor. This was the recognized line for a long period of years, and had been expressly recognized as the line in one of the deeds in the direct line of the title, to which the vendee's attention was directed by the recitals in his deed. Without elaborating further we conclude that the course of the road as marked on the ground must control.

The preliminary question which we have decided is one of law, and hence for the court. If there were doubt or dispute as to the location of the road to which we have held the call in the deed to refer, a question of fact would be presented for the decision of the jury. McCullough vs. Wainwright, 2 H., 171. We have carefully examined the testimony to ascertain if there is such doubt as to this question of fact as to require an issue, and conclude that there is not. On a rule to open a judgment it is the duty of the court to weigh the testimony, even though it be conflicting, and to refuse the issue if satisfied that the defence could not prevail if submitted to a jury. See Early's Appeal, 7 W. N., 515.

The rule is discharged.

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Court of Common Pleas of Montgomery County.

BARKDOLL VS. PENNSYLVANIA RAILROAD CO.

A railroad company using a defective car in the ordinary operations of the road, is liable to its employes for negligence. Situation of defective car marked "shop" in this case raises an inference of negligence, requiring a further explanation, the burden of which rests upon the defendants.

MOTION to take off non suit.

H. U. Brunner, Esq., for motion.

Charles H. Stinson and *Henry K. Weand, Esqs.*, contra.

The opinion of the court was delivered February 28, 1887, by BOYER, P. J.

On careful reflection I have come to the conclusion that this motion should prevail. If the defendants were using the defective car in the ordinary operations of the road they would be guilty of negligence; for they are bound to their employes to furnish them with cars in good repair, and provided with the usual and proper appliances to promote safety in the handling of them. On the other hand, employes assume at their own risk the ordinary dangers of their employment. Accidents to cars must be expected, and in case they are broken it is implied that they must be moved to their proper destination for repairs; and the dangers necessarily incident to their being handled for that purpose are to be included in the risks which the railroad employe assumes. But was the broken car in this case moved for that purpose? It was loaded, and in a train of other cars. Had it been broken whilst its load was upon it; or was it loaded for use after it had been broken? It was marked "Shop," which indicated that it was marked for repairs. Was it afterwards only handled for that purpose, or for traffic? Upon these points the testimony is not clear. But the situation of the car, loaded, and in a train of other cars, although it was marked for the "shop," still raises an inference requiring a further explanation, the burden of which rests upon the defendants.

For this reason, now, February 28, 1887, I sustain the motion and take off the non suit.

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Court of Quarter Sessions of Beaver County.

Beaver County Licenses.

Under the act of March 22, 1867, the court, in considering an application for liquor license, should have such regard to the number and character of the petitioners, for and against the application, as is required by all the circumstances of the case; which include the knowledge possessed by the court, facts whereof judicial notice should be taken, the testimony of witnesses, the opportunity of knowledge of the petitioners, their bias, prejudice, interest, and like matters, and grant or withhold the license accordingly.

It is the necessity for a hotel or eating-house which is to be considered; the necessity for a license to sell intoxicating drinks follows as a necessary incident.

Application for hotel and eating-house licenses.

S. B. Wilson et al., Esqs., for applications.

James A. Stranahan et al., Esqs., for remonstrances.

The facts are stated in the opinion of the court delivered March 23, 1887, by Wickham, P. J.

It is provided by the act of March 22, 1867, that "when an application is made to any Court of Quarter Sessions of this commonwealth for license to sell intoxicating drinks, it shall be lawful for said court to hear petitions, in addition to that of the applicant in favor of and remonstrances against the application for such license, and in all cases to refuse the same whenever, in the opinion of the said court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public and entertainment of strangers and travelers."

The word "due" is defined by Webster as follows: "Required by the circumstances, proper, suitable." Hence, by a "due regard" the Legislature must have meant a proper, suitable regard, such as is required by all the circumstances of the case. These circumstances include the knowledge possessed by the court, facts whereof judicial notice should be taken, the testimony of witnesses, the opportunities of petitioners and remonstrants for knowing the things about which they volunteer information, their bias, prejudice, interest, and

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like matters. It would seem, therefore, somewhat absurd to adopt the view contended for by one of the learned counsel for the remonstrants, and hold that a "due regard" for the petitioners and remonstrants, their characters being equally good, requires that the court shall be absolutely governed by the opinion of the majority. The view insisted upon contemplates that the witnesses shall be numbered instead of the evidence weighed; that the scales of justice shall be exchanged for the ballot-box; and that the courts, instead of being, as heretofore, and as contemplated by Article V, Section 21, of the Constitution, places where judges shall exercise only judicial functions and where justice shall be judicially administered, shall become mere polling-stations.

This construction of the law would introduce local option in a new and unheard-of form. The judges would sit to simply register the decrees of a majority of all who choose to vote, and to announce that this, that or the other person had been elected for one year to the office of hotel-keeper or a like position, or defeated for a similar place. What discretion is involved or permitted, if cases are to be determined after this fashion? Such so called judicial work could be as satisfactorily performed by the court-crier as by the judge.

The new construction of the act of 1867, under consideration, is alleged to be sustained by the decision of the Supreme Court in Reed's Appeal, 4 Central Reporter, 909. As I understand that case, nothing of the sort was decided therein. It is true that the Supreme Court uses an expression, which is a mere dictum, and not a necessary part of the decision, that, standing alone and unqualified, furnishes some basis for the argument of the remonstrants' counsel; but, in the same opinion, it is said that the petitions pro and con are, after all, "in the nature of evidence, for the information of the court," in determining the question of necessity. The court does not say that the petitions and remonstrances are the only evidence to be considered on this question, and doubtless never dreamed that it was uttering anything which could be construed as converting the courts below into election boards.

The result in this county of adopting the rule contended for would be very surprising. Had I heretofore followed the elective or counting process, it is reasonably certain that in one small town, from which a remonstrance rarely ever comes, there would be ten times the number of licensed houses needed by the community.

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Beaver County Licenses.

It is further contended by the particular counsel for the remonstrants, already referred to, that in considering an application for hotel license the question before the court is not the necessity for a hotel to accommodate the public and entertain strangers and travelers, but the necessity for a license to sell intoxicating drinks. I do not so understand the law. A hotel under our statutes is a place where every well behaved stranger or traveler, who is willing to pay reasonable rates for accommodation, is entitled to receive food, drink and lodging. The court must, therefore, look at the necessity for the hotel, not alone at the necessity for one of its constituent parts. As Judge Agnew says, in Schlaudecker vs. Marshall et al., 72 Pa., 207, it is the duty of the court to ascertain the fitness of the applicant, and the "necessity of his house for the public accommodation as a hotel or an eating-house." It is the thing licensed, not the license itself, or one of its incidents, which must be considered. It may be conceded that the authorized sale of intoxicants for use as a beverage is in the main injurious to the community. A hotel license under our present laws means, however, more than the right to sell liquors, and to change these laws by judicial construction would be exercising a power not possessed by the courts. The remedy is with the Legislature.

This court will continue to administer the license laws in the way it has done heretofore until a change is made by the Legislature, or by a clear decision of the court of last resort.

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Court of Common Pleas of Luzerne County.

CHANDLER VS. BENNETT.

The court will open a judgment on a promissory note, entered more than six years after the maturity of the debt, on a warrant of attorney to confess judgment, not under seal, to enable the defendant to plead the statute of limitations.

RULE to open judgment.

S. M. Parke, Esq., for plaintiff.

B. F. McAtee, Esq, for defendant.

The opinion of the court was delivered January 17, 1887, by RICE, P. J.

This promissory note, with confession of judgment, was not entered until more than six years after its maturity. Whether under such circumstances the court ought to open the judgment to enable the defendant to plead the statute of limitations is a mooted question. In the case of Morris vs. Hannick, 3 Luz. Leg. Reg., 56, this court refused a similar application upon the ground that the statute of limitations never extinguishes a debt; it only forms a bar to the remedy of the holder to recover it by action. "But," says the court, "it is not that remedy which these plaintiffs are pursuing; on the contrary, they have selected the remedy attaching to the confession of judgment, and to this the statute of limitations does not apply." This decision was followed and approved by other Courts of Common Pleas in the cases of Person vs. Weston, 1 Kulp, 387; Pierce vs. McClurg, 1 Ch. Co. Rep., 241; Spang vs. Deibler, 1 Pa. C. C. Rep., 670.

In the last cited case Judge Simonton, after considering the effect of the act of 1806 upon the question, says: "Hence, if we were to open the judgment, and treat the case as though it were an action, and permit the defendant to plead the statute of limitations, we would, by an arbitrary act, annul an essential part of the contract between them and the creditor, and deprive her of a valuable right." On the other hand, it was held by Judge Williams, in Kempner vs. Laney, 14 Phila., 646, that the presumption of payment attaches to such an instrument at the end of six years after its maturity, and therefore the judgment should be opened to permit the defendant to make

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the defence. This ruling was followed by Judge Sittser in the case of Sickler vs. Sickler, 2 Pa. C. C. Rep., 313.

In a very recent case it was held by the court of Lackawanna county that where a defendant sets up the bar of the statute he must show some equitable cause in aid of his motion to have the judgment opened; as, for example, that he has lost the benefit of evidence by the death or absence of witnesses, or that his papers have been lost or destroyed, among which was material evidence against the plaintiff's claim. Smith vs. Nichols, 2 Pa. C. C. Rep., 372. This conclusion is sustained by a very able opinion; but we venture, nevertheless, to predict that eventually this middle ground will have to be abandoned, and that the bar of the statute will of itself be held as meritorious a ground for opening the judgment as payment or a discharge in bankruptcy. See Wise's Appeal, 99 Pa., 193; Adams vs. Mortland, 2 Penny., 366.

In Ekel vs. Snevily, 3 W. and S., 272, Gibson, C. J., said: "It was said in Brown vs. Sutter, 1 Dall., 239, that a judgment will not be opened to let in the statute of limitations; but as the plea of that statute has since been considered in Shock vs. McChesney, 4 Y., 507, and The Bank vs. Israel, 6 S. and R., 294, to be no longer an unconscionable one, the rule of practice would scarce be held so now." Speaking of the same rule Judge Sharswood said: "If that practice has been changed it is only because a plea of the statute has ceased to be considered as an unconscionable one, and even to be regarded with peculiar favor by the courts on the broad grounds of public policy." Building Association vs. Seemiller, 3 Phila., 115. In the recent case of Herman vs. Rinker, 10 Out., 121, the court below opened the judgment for the sole purpose of letting in the plea of the statute of limitations, and it does not appear that the motion was aided by any of the circumstances, as, for example, the death of witnesses or loss of papers, which, according to the rule suggested in Smith vs. Nichols, *supra*, would seem to be required.

Judge Paxson, after quoting with approval the language of C. J. Gibson in Ekel vs. Snevily, *supra*, says: "And there seems a propriety, in the present case, of opening the judgment to let in the plea of statute, inasmuch as the judgment was entered without leave of court, or the affidavit required thereby, upon a note which upon its face was then barred by the statute. In any event it was a mat-

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ter in the discretion of the court, and we see no error in opening the judgment."

In the case of Sossong vs. Rosar, 2 Am., 197, Judge Green, after showing by the authorities that the plea of the statute is now regarded as a perfectly conscionable one, and that the courts of equity have followed the law in all analogous cases upon principles of the soundest public policy, proceeds to show that the decision of Herman vs. Rinker was not based solely upon the fact that the judgment was entered without leave of court, and without the affidavit required by the rules of court, but upon broader grounds. He says: "We held it was a matter in the discretion of the court below in any event, and we could see no error in opening the judgment. A very sufficient reason lies in the fact that the defendant has had no hearing when judgment is entered by confession; and if upon the face of the obligation containing the authority to enter judgment it appears that the statute was a bar to the debt when the judgment was entered, it follows that the defendant has had no opportunity to present a perfectly lawful and proper defence."

It is said the motion is an appeal to the equitable powers of the court, and is to be granted or refused according to the sound discretion of the judge, all of which is conceded. But equity is bound by rules as well as law. If it is the exercise of a sound discretion to grant relief in one case, the refusal to grant the same relief or the imposition of more stringent conditions in another case, depending on the same essential facts, can not be. When the above cited cases declare that the matter was within the discretion of the courts below, it surely was not meant that each judge may grant or refuse the motion in a case like the present, according to his notion of the favor or disfavor with which the plea of the statute ought to be regarded, and that their action, no matter how diverse or conflicting, will be held conclusive. Such a doctrine concerning the discretion of a chancellor would justify the criticism of Selden when he said: "For law we have a measure and know what to trust to. Equity is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure the chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with a chancellor's conscience." 3 Bl. Com., 432—note.

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Furthermore, it would practically nullify the act of April 4, 1877, P. L. 53, giving an appeal to the Supreme Court, and we would have one rule of law in Luzerne, another in Dauphin, another in Wyoming, and still another in Lackawanna, upon precisely the same question. In the same sense it is in the discretion of the court to open a judgment on an allegation of payment, or a discharge in bankruptcy, or usury. But if the facts constituting the defence be undisputed, would a court say that it was not bound to open the judgment, no reason to the contrary being shown in the evidence? Clearly not. "In Pennsylvania it is the right of a defendant in a judgment confessed against him by virtue of a warrant of attorney to have it opened when he promptly applies and shows a legal or equitable defence, which existed at and before the time it was entered." Wise's Appeal, *supra*. Where the facts upon which the motion is based are undisputed, or satisfactorily established by proof, and the effect which they ought to have upon the discretion of the court is capable of being defined and measured by a certain rule, we take it that such rule should be uniformly applied. In other words, to repeat what we have before said, what is adjudged to be sufficient to move the court in one case ought to be held so in every other case, the essential facts, of course, being the same.

With these general principles in view let us return for a moment to the cases of Herman vs. Rinker, *supra*, and Sossong vs. Rosar, *supra*, and see if they do not furnish a certain rule by which this question may be decided. It is true that they do not declare in so many words that judgment *must* be opened in every case to allow a plea of the statute of limitations when applicable, but, as explained in the latter case, we think they do decide, however, that it is perfectly proper to open the judgment for that purpose, even though the motion be not aided by any other meritorious circumstances. If, then, the defence is not to be regarded with disfavor, but is to be treated as a perfectly proper and lawful one, and if the fact that the defendant has had no opportunity to make it is of itself a sufficient justification for opening the judgment, does it not follow that a refusal of the motion, or the imposition of conditions which would imply that the defence was to be disfavored, would be erroneous? After a careful consideration of the question we think the logic of these later decisions, as well as the general tendency of the law, must inevitably lead to that conclusion. But even if we adopt the

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view that this defence, when set up as a reason for opening a judgment, ought to be accompanied by circumstances giving it a meritorious standing, we think the rule in the present case ought to be made absolute. Ordinarily, it is true, the court will not open a judgment on a mere conflict of testimony between the plaintiff and defendant; but where the defendant swears to a defence on the merits, and in addition it appears on the face of the note that it was barred by the statute when judgment was entered, we think a different rule ought to prevail. The lapse of time is of itself, to some extent, a corroboration of the defendant. At any rate he ought not under such circumstances be held to so strict a rule.

The rule is made absolute, note to stand for declaration, and defendant to plead within ten days.

Court of Quarter Sessions of Northampton County.

COMMONWEALTH VS. SAMUEL V. BONSTEIN.

A husband and wife during a period of years had many quarrels, and the conduct of each was such as to embitter the life of the other, when the husband apparently without any previous notice moved away from their accustomed habitation to another not far remote. He asked her to go along. She refused. After that he provided nothing for her maintenance. She made complaint for desertion. *Held* that the desertion was on her part, and the complaint was dismissed.

DESERTION.

R. I. Jones, Esq., for commonwealth.

Frank Reeder, Esq., for defendant.

The facts fully appear from the opinion of the court delivered by SCHUYLER, P. J.

This is a complaint under the act of April 13, 1867, P. L. 78, P. D. 134, Sections 54 and 55, which provides that if any husband

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or father, being within the limits of this commonwealth, shall "separate himself from his wife and children without reasonable cause," he shall suffer the penalty mentioned in the act. The defendant is a painter by trade, and lived, prior to the third day of September last, with his family in this borough. His business, however, was principally in Williams township, and he concluded to move his family there. Accordingly, on the date just mentioned, he employed teams and proceeded to his house in Easton to carry his new plans into execution. When he reached the house he found the doors locked, his wife being within, and he effected an entrance through a second story window. His wife says that the first intimation she had of his intended removal was received only a few moments before the teams arrived. This he denies, saying that he told her some days before. Be this as it may, he loaded up the furniture, etc., except such articles as his wife claimed, and said to his wife that she should go along and make but one moving of it; but she declined doing so, and subsequently removed the articles she had claimed to her father's house, where she is now living.

The defendant and his wife had lived together very unhappily for quite a number of years, there being between them that curse of so many households—incompatibility of temperament. He had a will of his own, and she had a will of her own. Four children had been born into the family, the youngest being now four and the oldest thirteen years of age. He was in the frequent habit of calling his wife by vile names, even in the presence of his children, names which no husband should apply to his wife under any circumstances, and least of all before such an audience. I do not, however, recall any evidence that he ever laid violent hands on his wife. On the other hand, she too called him bad names and spoke very disrespectfully of his mother. The evidence also shows that on one or two occasions when in a passion she struck her husband. Once she left him, but afterwards expressed contrition and returned, only, however, to repeat the old experience. And so they lived—this ill starred, ill mated, unhappy couple—both evidently too proud to yield, even for the sake of their little children. It seems as if they had yet to learn the lesson which all, the high and the low, the rich and the poor alike, who would attain to happiness in the married state, must learn, that the only possible way to such happiness is by mutual concession and forbearance.

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At the hearing the door was thrown wide open for the reception of any and all evidence that was offered, in the hope of finding the real clue to the troubles under investigation; and yet at the close of the testimony, which occupied over half a day in the taking, I found myself perplexed to know what disposition to make of this case. Of all cases which a Judge has to encounter these are the most difficult. How to get at the bottom facts is the difficulty. It is possible to conceive of a thousand hidden ways in which a husband may embitter the whole life of his wife, and of a thousand hidden ways in which the wife may embitter the whole life of her husband, that lie too deep to be fathomed by testimony. One of the parties may be open and outspoken in all that is done and said, the other may be sly and insidious, so that it no doubt frequently happens that the one who is most to blame has the best of the testimony.

Another cause of embarrassment in dealing with cases like the present lies in the necessity of holding such cases with a strict hand on grounds of public policy. The Judge is often placed in a position where he is satisfied that the parties would be more happy apart, and where it would be a pleasure to him to speak the word of separation, but he dare not. To lend a willing ear to every complaint for desertion and every petition for divorce, would not only imperil the welfare of the children of the marriage but would increase the feeling of unrest and discontent with the married state, which the records of our courts show to be frightfully common among certain classes. The people must be taught that marriage is in law as well as in fact a serious business—a contract for life—and this can best be done by holding parties asking for a separation to the strictest proofs.

It is manifest that the evidence before me is not up to this standard. On the morning of September 3d the defendant and his family were living together in the usual way, with no thought, so far as the evidence shows, on the part of his wife of leaving him until she learned of his intention to move to Williams township. If he never told his wife of this intention until the arrival of the teams, he behaved very badly; but even this would not relieve her from her duty to follow him. He invited her to go with him, and it was her legal duty to do so. The evidence satisfies me that the removal was not a part of a scheme to get rid of his wife, but that it was made in good faith in order to be nearer his business and to

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reduce his expenses. The distance was not great to the new home and the home itself was unobjectionable. I think, therefore, that her refusal to accompany her husband under such circumstances was desertion on her part but not on his.

But whilst the defendant is not guilty of the offence charged against him, and the complaint must be dismissed for that cause, still it is but proper that he should be made to pay the costs. His treatment of his wife well merits so much of punishment. The vile epithets he used towards her can not be justified on any theory, and the offence is aggravated by the fact that the epithets were used in the presence of their children. I will therefore dismiss this complaint and place the costs on the defendant, and in thus disposing of the case I indulge in the hope that these parties may get together again, if not for their own sakes at least for the sake of their children. They are both intelligent above the average, and I do not believe either as bad as they paint each other. He is a sober, industrious man, who seems to have provided well for his family. She is ladylike in manner and appearance, and the fact of her former return to her husband, as testified to by Mr. Reich, speaks volumes in her praise. If her cause is just it will not suffer by a repetition of that experiment.

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Supreme Court of Pennsylvania.

Appeal of Henry A. Martin.

An injunction will lie to restrain the mortgagor in possession from committing waste by digging and removing from the mortgaged premises sand and stone, which lessens the value of the premises for general purposes.

Under the facts of this case such injunction was granted.

Certiorari to the Court of Common Pleas of Montgomery county. In equity.

Appellant purchased of Joseph E. Ambler, the appellee, a tract of three acres of land in Ambler village, and gave a purchase-money mortgage for the whole consideration, $3,500. A verbal agreement was alleged that the premises were to be divided into building lots, and the mortgage reduced proportionally at the sale of each lot. After a short time appellant began to excavate stone and sand, and sell the same, whereupon Ambler applied for an injunction to restrain the waste.

On the hearing in the court below his Honor Judge Boyer filed the following opinion:

The plaintiff has supported the main averment of his bill, to wit, that the defendant is by his acts depreciating the present value of the mortgaged property, by the affidavits of a number of reputable citizens, residents of the vicinity. These affidavits have not been met by the affidavits filed in behalf of the defendant, which are mostly aside from the main point now at issue, namely, how the operations of the defendant affect the security of the mortgage. Considering the liberal terms upon which the property was conveyed to the defendant, the whole of the purchase money being included in the mortgage, the mortgagee is especially entitled to protection from waste. It is true the defendant alleges a scheme for building, which, if successfully carried out, might result in adding to the value of the property; but there is no present assurance that it will be realized, and in the meantime the security of the plaintiff's mortgage is being seriously depreciated. Until, therefore, the defendant shall show

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some tangible evidence of the realization of his plan, the court must consider his present operations upon the premises, under the evidence, as waste, from which the plaintiff is entitled to relief. Until, therefore, the defendant shall exhibit to the court some proof of contracts for houses actually made with responsible parties, or in some other way satisfactorily show that his present scheme is more than a mere contingent operation, or further secure the plaintiff from probable loss in case the defendant's project should fail, we feel it to be our duty to grant the preliminary injunction prayed for, upon the plaintiff giving the usual security in the sum of $1,000, with leave to defendant at any time to move for a dissolution of the injunction on five days notice.

And on February 7, 1887, on motion to dissolve the injunction, the following opinion was delivered by BOYER, P. J.:

Since the issuing of the preliminary injunction in this case nothing has appeared to alter the view of the court in according to the plaintiff the protection he sought by his bill. Eleven disinterested witnesses have in their affidavits testified that the acts of the defendant have depreciated the value of the property, and if allowed to proceed will continue further to reduce the market value of the property and endanger the security of the plaintiff's mortgage. Against this testimony the defendant has made but a feeble showing, and has not established either the necessity of his acts or the likelihood of their not resulting in the depreciation of the premises.

The defendant's theory for the excavations upon the ground may be correct; but it is speculative, and he is unfortunate in being alone in his views of the improvement of the property thereby. In the eyes of others his excavations are waste. From this the mortgagee is entitled to protection until the defendant by reducing the amount of the mortgage or by some other satisfactory arrangement has sufficiently secured the mortgagee from probable loss by his experiment.

And now, February 7, 1887, the motion to dissolve the preliminary injunction is overruled.

IN THE SUPREME COURT.

J. S. Freeman and *William Gorman, Esqs.*, for appellant.

A preliminary injunction should never be granted except in a clear case of right and in order to prevent irreparable injury. Auden-

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reid vs. R. R. Co., 18 P. F. S., 370; Brown's Appeal, 12 Id., 17; Clark's Appeal, 12 Id., 447; Leininger's Appeal, 10 Out., 398.

If the damages are susceptible of compensation no injunction should be granted. Richard's Appeal, 57 Pa. St. R., 105; Myers' Appeal, 73 Id., 164.

Charles H. Stinson, Esq., for appellee.

A mortgagor in possession is considered the owner of the property. But if the security is insufficient an injunction may go against a mortgagor. Bispham's Equity, 482; 4 Kent's Com., 161.

On an appeal on preliminary injunction the Supreme Court will only question whether the discretion of the court below was rightly exercised. Hoffman's Appeal, 10 W. N. C., 401; Paxson's Appeal, 106 Pa. St. R., 429.

The opinion of the court was delivered May 2, 1887.

PER CURIAM.—On the facts found by the learned Judge and fully sustained by the evidence, there was no error in granting the preliminary injunction and in refusing to dissolve the same.

That the appellant was reducing the value of the property and lessening and endangering the security of the appellee, is clearly shown.

Decree affirmed and appeal dismissed at the cost of the appellant.

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LAWLEY'S APPEAL.

A widow is too late in her claim to have $300 in property set apart to her out of the rea estate of decedent after the administrator has sold the same at public sale under an order of the Orphans' Court for the payment of debts; and her neglect to make her claim at the proper time is not sufficient ground to set aside the sale.

APPEAL of Isabella Lawley from a decree of the Orphans' Court of Montgomery county.

The facts of the case, as well as the opinion of the court below as delivered by BOYER, P. J., April 2, 1886, will be found reported in full in 2 MONTGOMERY COUNTY LAW REPORTER, 56.

George N. Corson, Esq., for appellant.

Relies upon the express words of the act of April 14, 1851.

Henry M. Tracy, Esq, for appellee.

A demand for an appraisement is too late after the administrator has incurred expenses in proceedings to effect a sale of the real estate. Rhone on Orphans' Court, 295; Davis' Appeal, 10 Casey, 256; Baskin's Appeal, 2 Wright, 65; Tibbin's Estate, 5 Phila., 100; Neff's Appeal, 9 Har., 243; Crause's Estate, 6 Phila., 71; Somer's Estate, 9 W. N. C., 559; Hufman's Appeal, 31 P. F. S., 326; Hunt's Appeal, 12 W. N. C., 562.

It is no part of the duty of the administrator to set aside the widow's exemption until after demand made. Williams' Appeal, 11 Nor., 71; Neff's Appeal, *supra*.

Laches or negligence destroys the title to relief. Scott's Appeal, 17 W. N. C., 440; Cremer Estate, 7 Id., 544.

The opinion of the Supreme Court was delivered May 2, 1887.

PER CURIAM.—To entitle a widow to three hundred dollars worth of property she must make the claim at a proper time. In this case she not only refrained from making any such claim but urged the administrator to sell the property, saying she would have nothing to do with it. After he had obtained an order from the Orphans' Court to sell the property for the payment of the debts of the decedent, and actually sold the same, her claim came too late, although it was made before confirmation of the sale by the court.

Decree affirmed and appeal dismissed at the cost of the appellant.

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JACOB M. ALLEBACH VS. REIFF H. GODSHALK.

Plaintiff set up a land lottery, received $50 down upon a lot drawn therein, and a note for $100, the deed to be delivered to defendant on payment. Defendant was given possession and encouraged to improve the lot. He built a fence, dug a well, and built a shop. Plaintiff had deed acknowledged and placed in bank, to be delivered on payment of a $100 note. The note was renewed by payments on account. Seven years thereafter plaintiff refused a tender of balance due and brought ejectment. *Held*, that as plaintiff showed a good title from the commonwealth, that title was not affected by the collateral illegal contract; that all money paid on account of the lottery was lost; that the deed, even if delivered, was altogether worthless for any purpose, under the act of March 31, 1860; that the oral contract and improvements were not sufficient to redeem the case from the statute of frauds; and that the plaintiff should have the verdict.

ERROR to the Court of Common Pleas of Montgomery county.

On October 25, 1875, the plaintiff, being the undisputed owner of a tract of land containing about thirty-six acres, situate at Rahn's Height, met, in pursuance of a previous agreement, a large number of persons at that place; and, to evade the lottery laws, an agreement was drawn up and signed by the plaintiff and a large number of persons—the defendant, Reiff H. Godshalk, being one of them—and each man paid down $50, thus making $4,450 down money and leaving a balance of $8,900 to be paid.

The purchasers divided the large tract into eighty-nine lots. A short time before the balance of the purchase money was due the plaintiff was directed to prepare a separate deed for each lot. This was done, and each deed was delivered to the party designated in the conveyance upon the payment of $100, being the balance of the purchase money charged against each lot.

After the allotment of the land among the purchasers, the defendant and Martin Kulp entered into a parol agreement by which defendant was to have lot No. 42, formerly allotted to Kulp, who was to take lot No. 38, formerly allotted to defendant. Godshalk was to have credit for $50 on account thereof, which he had paid, and give a note at bank for the balance of the purchase money, to wit, $100. This was done, and by permission of plaintiff defendant entered upon the premises, fenced it in, dug a well, and erected thereon a shop worth $450, which was subsequently removed. During the time this work was in progress plaintiff came upon the premises several times and encouraged the defendant to build and improve the lots, and congratulated him upon the method of improvements. A deed was drawn for lot No. 42 and left at the Schwenksville bank.

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In 1882 defendant failed and could not pay all his indebtedness to plaintiff, and although he tendered the amount he still thought due on this lot and demanded his deed, plaintiff refused and brought ejectment. On the trial plaintiff proved his title out of the commonwealth and rested. Defendant then proved the circumstances of the parol sale, the permission by plaintiff for defendant to take immediate possession of the lot, the improvements made, and the assent of plaintiff for seven years.

The court below in charging the jury *inter alia* held in answer to defendant's points as follows:

1. If the jury find that the defendant took exclusive possession of lot 42, continued to hold such possession to this date, made valuable improvements with the assent of the plaintiff, tendered the balance of the purchase money, and that the metes and bounds of said lot were fully described by deed drawn to the defendant and duly acknowledged but not delivered, such facts are sufficient to take the case out of the statute of frauds, and the verdict should be for the defendant.

Answer of the Court. This is true if the jury find these facts, and that possession of the premises was delivered and improvements made in pursuance of the parol contract of sale existing between the parties.

2. If the defendant went into possession of lot 42 in pursuance of an illegal lottery, continued in exclusive possession of the same to this date, paid part of the purchase money, made valuable improvements with the knowledge and assent of the plaintiff, and this was all done in pursuance of such illegal lottery set up by the plaintiff and others, then the verdict must be for the defendant.

Answer of the Court. This would be true if the jury were to find the facts as here stated; for in that case the plaintiff could not take advantage of his own wrong and ask the aid of the court to recover back that which in pursuance of an illegal and forbidden contract he had delivered.

The verdict was for the defendant.

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Allebach vs. Godshalk.

IN THE SUPREME COURT.

Charles Hunsicker, Esq, for plaintiff in error.

The title of defendant being obtained by lottery is void under the act of March 31, 1860, Sec. 52, P. L. 396.

The test whether a demand connected with an illegal transaction can be enforced in law is whether the plaintiff requires the aid of the illegal transaction to establish his case. Swan vs. Scott, 11 S. and R., 155; Hipple vs. Rice, 26 Pa. St. R., 406; Fisher vs. Himes, 5 Id., 452.

The parol contract here has not the necessary ingredients to take it out of the statute of frauds and perjuries. Moore vs. Small, 7 Har., 467; Woods vs. Farmer, 10 Watts, 195; Detrick vs. Shaner, 95 Pa. St. R., 521; McKowen vs. McDonald, 43 Pa. St. R., 441; Postlewaite vs. Freese et al., 7 Casey, 472.

Aaron S. Swartz and *F. G. Hobson, Esqs*, for defendant in error.

If this transaction was tainted by lottery, the plaintiff, being the wrong-doer, can not take advantage thereof. Holman vs. Johnson, Cowper, 341; Way vs. Foster, 1 Allen, 408; Gregg vs. Wyman, 4 Cush., 322; Stewart vs. Kearney, 6 Watts, 453.

Where the contract is part executory and part executed, the executed part must stand and the executory part can not be enforced by either party. Scheidenbender et al. vs. Charles, Adm'r, 4 S. and R., 151; Nicholas Balliet's Case, 1 Leg. Chron., 198.

The parol contract in this case was so far executed that it would be unjust and inequitable to disturb the defendant in his possession. Hart vs. Carrol, 85 Pa. St. R., 508; McGibboney vs. Burmaster, 53 Id., 332; Jamison vs. Dimock, 95 Id., 52; Mulliken vs. Dravo, 67 Id., 230; Lauer vs. Lee, 42 Id., 165; Reed vs. Reed, 2 Jones, 121.

The opinion of the Supreme Court was delivered May 9, 1887, by GORDON, J.

The defence in the case before us is of a very flimsy and unsubstantial kind: an alleged parol sale, with nothing to deliver it from the grasp of the statute of frauds and perjuries. Godshalk's claim to the lot described in the writ had its origin in the lottery contract of the 25th of October, 1875, and was, of course, void under the act of March 31, 1860.

Martin Kulp had drawn, at the lottery, lot No. 42, the one in controversy, and the defendant No. 38. They agreed to exchange, and to this arrangement it is said the plaintiff assented.

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It is further alleged that the deed for this lot was duly executed and delivered in escrow to the Schwenksville bank. That the deed was executed by the plaintiff, along with others, is admitted; but that it was delivered, even in escrow, is denied.

John C. Boorse, who drew the deeds and had them executed, says he delivered them to the plaintiff, and that he did not understand that it was part of the contract that they should be deposited in the bank for delivery; whilst Allebach testifies that he left them at the bank for his own convenience, and afterwards took them to his own house. All this, however, matters but little, for at best this deed, not having been in fact delivered, could not have been used except as proof of the terms and conditions of the parol sale, and without other proof could not of itself avoid the statute. Hart vs. Carrol, 85 Pa., 508. Furthermore, this deed, with the others, was executed in pursuance of the lottery arrangement, upon which the defendant's title, whether to lot No. 38 or No. 42, depended, so that it was altogether worthless for any purpose. Moreover, the payment of the fifty dollars purchase money was, as Godshalk confesses, paid on the lottery contract of October 25, 1875, and is, in consequence, out of the case.

Again, as to the improvements which the defendant alleges he put on the lot in pursuance of the parol sale, these can have no effect to redeem the case from the statute, for, except the fence, they were removed before or about the time of the bringing of this ejectment suit. It is thus manifest that the defendant's oral contract has not the shadow of foundation on which to stand.

As to the plaintiff, were he attempting to enforce the 25th of October contract, he, in like manner, could have no standing in court, for it would be allowable to prove that this contract was executed for an unlawful purpose. Hence his defeat would be inevitable. Bredin's Appeal, 92 Pa., 241. But he is attempting nothing of the kind. His suit is ejectment, and he stands upon an untainted legal title, which can not be affected by the collateral illegal contract any more than by the unexecuted parol contract.

By all rule, therefore, the plaintiff should have had the verdict, and so the court ought to have instructed the jury. As what we have said sustains the plaintiff's first assignment of error, we need not notice the others.

The judgment is reversed and a new venire ordered.

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LANCASTER AVENUE IMPROVEMENT COMPANY VS. JOHN RHOADS.

A turnpike company is bound, in consideration of its franchises, to keep its road in a safe condition for public travel.

It can not, whilst taking tolls, divest itself of all responsibility in that regard, and put it wholly upon a person who contracts to make excavations for grading on its road bed; it being the duty of the company, whilst the work is in progress, to guard that part of their road in actual use by them; and see to it that proper barriers or devices are erected to direct travelers, especially at night, into the proper track, and warn them off of the unsafe portion of the road.

ERROR to the Court of Common Pleas of Montgomery county.

The facts of this case, as well as the opinion of the court below as delivered by BOYER, P. J., are fully reported in 1 MONTGOMERY COUNTY LAW REPORTER, 181.

N. D. Tyson and *John B. Thayer, Esqs.*, for plaintiff in error.

The doctrine of "independent contractor" is applicable to such contracts made by municipal corporations: Painter vs. Pittsburg, 10 Wr., 213; Erie vs. Calkins, 85 Penna. St., 247; Reed vs. Allegheny, 29 P. F. S., 300.

It is applicable to a school district: School District of Erie vs. Fuess, 98 Pa. St., 600; to a canal company: Graham vs. Ohio Canal Co., 13 P. F. S., 290; to a township: Mahanoy Township vs. Scholly, 3 Nor., 136; to a coal company: Mansfield Coal Co. vs. McEmery, 10 Nor., 185; to a railroad company: Hunt vs. Penna. R. R. Co., 51 Penna. St., 475.

The measure of responsibility of a turnpike company does not exceed any of the above instances.

Aaron S. Swartz and *Henry Pleasants, Esqs.*, for defendant in error.

The opinion of the Supreme Court was delivered May 16, 1887, by CLARK, J.

The Lancaster Avenue Improvement Company is a private corporation, created in the year 1880, for the purpose of constructing and maintaining a turnpike road from Fifty-second street, in the city of Philadelphia, through the counties of Montgomery, Chester and Delaware, to a point one-half mile west of the eighteenth mile-stone on the old Lancaster road, a distance of some fifteen miles. The turnpike was opened for travel some time in the fall of 1882, and the company was after that in the receipt of tolls under its charter.

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About two weeks after the turnpike was completed the company undertook to let down the grade of the road at Wayne for a distance of some five hundred feet. The cutting at the point of highest elevation was about six feet deep, and ran out to grading points about two hundred and fifty feet distant, east and west.

Mr. Henry Dunne, the superintendent, under authority from Mr. Cassatt, the President of the company, made a contract with B. M. Shandy for the performance of the work, Shandy to receive twenty-five cents per cubic yard for the grading and ninety cents per square yard for the stone work. The contractor was to furnish all the labor, take charge of the work, and perform his contract in a good and workmanlike manner; he agreed also to provide a safe passage way for the public, and to indemnify the company against loss arising from the negligent performance of his contract. He gave no bond nor was the contract reduced to writing.

The centre line of the road having been ascertained by the superintendent, and the extent and depth of the excavation indicated on the ground by stakes set by an engineer, the contractor proceeded with the work. In order that the public travel on the turnpike might not be impeded or rendered unsafe a passage way was left on the north side of the road until the excavation should be made, and the stone put in place on the south side; when it was proposed to divert the travel into the cut on the south side, until the whole work was completed.

It was at this stage of the work, when the travel had just been turned into the cut on the 12th of December, 1882, that the plaintiff's injury was received. He was hauling hay from his home to Philadelphia, starting about three o'clock in the morning; he entered the turnpike at the Eagle; when he came to this excavation he found no barriers erected, no light burning to direct his course or to warn him of danger. The night was sufficiently dark to render objects on the road indistinct, and his horses took a route so close to the bank on the north side of the excavation that his wagon, loaded with hay, was upset, and he was thrown off into the road and thus received the injuries complained of. The bank which caused the injury was near the centre of the turnpike, and it is alleged and the jury has found that there was nothing whatever to warn him of the existence of the obstruction. In the absence of all precautions against danger, the plaintiff in the night time might well assume that the

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centre of the road was the usually traveled route, that it was in proper condition of repair, and that he could pass safely upon it. It is clear, under the verdict, that it was owing to somebody's negligence that the injury occurred.

The defendant's contention, however, is that it was the negligence of Shandy which caused the injury; that Shandy had contracted to perform the work, and had entire control of it; that he was at the time exercising an independent employment, and was alone responsible for the negligence complained of. The general principle is undoubted that when a contractor takes entire control of a work, the employer having no right of supervision or of interference, the employer, if he is not negligent in his selection, is not liable to third parties for the contractor's want of care in the performance of it. This rule is applicable not only to individuals, Allen vs. Williard, 57 Penna., 374, but to private corporations: Ardesco Oil Co. vs. Gilson, 63 Penna., 146; Edmunson vs. Pittsburg, &c., R. R. Co., 111 Penna., 316. And also in Pennsylvania to municipal corporations: Painter vs. Pittsburg, 46 Penna., 213; Borough Susquehanna Depot vs. Simmons, 112 Penna., 384.

But when certain powers and privileges have been specially conferred by the public to an individual or corporation for private emolument, in consideration of which certain duties affecting the public health or the safety of public travel have been expressly assumed, the individual in receipt of the emoluments can not be relieved of liability by committing the performance of these duties to another. In such cases liability can not be evaded by showing that the injury resulted from the fault or neglect of a third person employed to perform these public duties: Wood on Master and Servant, 621, 624. In Pennsylvania municipal corporations, although invested with public privileges and charged incidentally with correspondent public duties and obligations, may in certain cases cast the responsibility upon an independent contractor whose negligence caused the injury: Painter vs. Pittsburg, 46 Penna., 213; Reed vs. Allegheny County, 78 Penna., 300; City of Erie vs. Calkins, 85 Penna., 247. But this is because they are municipal and public corporations; the rule has never been extended here or elsewhere to private corporations of the class we have referred to. The maintenance and repair of roads and streets is merely a burden imposed

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upon a municipality, whilst a corporation created for the purpose is compensated by tolls.

"There is certainly a very important distinction," says C. J. Redfield in Davis vs. Lamoille Plank Road Co., 27 Vt., 602, "between the liability of towns for damages accruing to travelers by reason of defects in the highways within their limits, and that of turnpike and other corporations, who derive a revenue from the use of their roads by travelers. In the former case the support of the road is a mere burden upon the towns, without any corresponding equivalent. The traveler pays no consideration for the use of the road. It is no advantage to the towns to have the roads used by travelers. So that in this case there is, properly speaking, no privity by way of a quasi contract between the traveler and the town." * * * "But in the case of corporations created for the purpose of maintaining a road for their own advantage, to be compensated by means of tolls collectible of all who use the road, the case is very different. In such cases the liability to pay tolls is a consideration for the undertaking on the part of the corporation to furnish a safe road for the use of the traveler as an equivalent. It is the same, in principle, as any other case where service is performed for pay. There is an implied understanding, resulting from the general rules of law applicable to similar subjects, that the person undertaking such service, whether it be a natural or artificial person, shall perform it faithfully; and, in case of failure, shall respond to the party thus paying his money by way of damages as an equivalent. Indeed, the liability of such corporations, as the defendants, is more analogous to that of a railroad which undertakes to carry for fare, which is but another name for toll, than to the liability of towns. And it was never doubted that railroads are liable for all damages accruing to travelers by reason of defects in their road or in its management."

A rule less stringent applies to public than to private corporations: School District of Erie vs. Fuess, 98 Penna., 606. No case in Pennsylvania has been cited which covers the precise point in question, nor has any case been brought to our notice which is in conflict with the rule as we have stated it. In Penna. and Ohio Canal Co. vs. Graham, 63 Penna., 290, the nature and extent of the company's liability was expressly defined by the statute, and hence the case is not applicable here to the full extent of what was there

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ruled; but it recognizes the general principle that where special privileges have been granted by the Legislature the duties imposed as the price of those privileges are imperative and must be performed.

Mr. Justice Sharswood, delivering the opinion of the court, says: "The principle of Painter vs. the Mayor of Pittsburg, 10 Wr., 213, has no application. That was an action for an injury sustained by the plaintiff from the negligence of the contractors of the defendants while engaged in the actual construction of a sewer. Had the plaintiff in this case fallen into the canal in consequence of the negligence of the contractors employed by the defendants while actually employed either in the construction or repair of this bridge, the case presented would have been entirely different."

From this dictum an inference is sought to be drawn that in the "repair" of the bridge the company would have been relieved of responsibility for the negligence of a contractor, but as the words "construction or repair" are used together it is more reasonable to suppose that the learned Justice intended such repairs as were made when the bridge was closed for the purpose from the public travel.

The defendant company, by the terms of its charter, was invested with special public privileges, that of "constructing and maintaining a turnpike road" for the private gain of the company. The road had been completed and was open to public travel, and the company had for several weeks been in the regular receipt of tolls. In consideration of the right to collect such tolls the proprietors of the road undertook to exercise due care and diligence in keeping the road in such repair that it might be traveled with safety to life and property.

Having undertaken to lower the grade whilst the road was open to travelers, it was the plain duty of the defendants to guard that part which they retained for public use; it was their duty to warn travelers of any danger that threatened by reason of obstructions in the road, and by suitable devices to direct them in the proper route; and of these duties, attaching to them as trustees for the public, they could not divest themselves by shifting the responsibility on others. If the road had been in process of construction, or had been closed for repairs, a different case would of course be presented.

The plaintiff, it is true, is not shown to have paid any toll, but he was liable to the regulations and requirements of the company; he was not obliged to pay until he reached a point on the road

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where tolls were demandable; he was not a trespasser; he was traveling the turnpike under the general invitation extended to the public, and was entitled to the protection which the law secured to the public; he was not required to pay in advance; he complied with the rules of the company by paying when and as the company required; the toll was demandable, and that was sufficient.

In this view of the case it is wholly unnecessary for us to consider the evidence as to the relation subsisting between the company and Shandy in the performance of this work; as to the traveling public Shandy must be regarded as the agent or servant of the company only and not as a contractor engaged in an independent employment.

Upon a careful examination of the whole case the judgment is affirmed.

IRWIN'S APPEAL.

An executrix having filed a first account; in five years thereafter a creditor asked for a citation to compel another account, to which executrix filed a demurrer. *Held* entitled to a citation.

APPEAL of N. Adeline Irwin from the Orphans' Court of Montgomery county, upon petition of J. Morton Albertson for citation.

The facts of this case, as well as the opinion of the court below as delivered by BOYER, P. J., was fully reported in 2 MONTGOMERY COUNTY LAW REPORTER, 27.

G. R. Fox and *G. R. Fox, Jr., Esqs.*, for appellant.

George W. Rogers and *Charles Hunsicker, Esqs.*, for appellee.

The opinion of the Supreme Court was delivered May 2, 1887.

PER CURIAM.—In view of the great lapse of time since the first account was filed, which showed a considerable sum of money to be in the hands of the appellant, we see no error in commanding her to file a further account.

Decree affirmed and appeal dismissed at the cost of appellant.

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Court of Quarter Sessions of Montgomery County.

In re Eighth Ward, Norristown.

The act of May 14, 1874, entitled "An act to prescribe the manner by which the courts may divide boroughs into wards," is constitutional.

Even if the said act is unconstitutional and the power to divide boroughs is vested wholly in the court, such court would appoint commissioners to report on the facts, so as to act more intelligently in making such division.

In re Division of Bern Township, 2 Penna. S. C. D., 34, distinguished.

Exceptions to the report of a commission organizing the Eighth ward of Norristown.

J. P. Hale Jenkins and *F. L. Murphy, Esqs.*, for exceptants.

Isaac Chism, Esq., contra.

The facts fully appear from the opinion of the court delivered May 16, 1887, by Swartz, J.

On the 23d day of October, 1886, an application was made to this court praying for the appointment of commissioners to inquire into the propriety of erecting a new ward out of parts of the Third and Fourth wards, in the borough of Norristown. This application was made under the act of Assembly entitled "An act to prescribe the manner by which the courts may divide boroughs into wards," approved the 14th day of May, 1874.

The commissioners were appointed as prayed for under said act, and on the 7th day of December, 1886, made their report in favor of the new ward. To this report exceptions were filed, but it is now admitted by the exceptants that the proceedings are in accordance with the requirements of the act of May 14, 1874; but they contend that this act is unconstitutional, and that the report should therefore be set aside.

To support this position they cite the case of the division of Bern township into election districts, decided March 14, 1887, wherein the Supreme Court held that the act of May 18, 1876, so far as it commanded the Court of Quarter Sessions to confirm the report of the viewers, unless exceptions be filed, is unconstitutional. This decision has no bearing upon the act of 1874.

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By an examination of the two acts, it will appear that the purpose of the act of May 14, 1874, is entirely different from that of the act of May 18, 1876. The former points out the method of dividing boroughs into wards, the latter directs how townships may be divided into *election districts*.

Article VIII, Section 11, of the constitution of 1874, provided that townships and boroughs should be divided into election districts as the Court of Quarter Sessions may direct, and the act of 1876 was declared unconstitutional because it takes this discretionary authority from the Court of Quarter Sessions and imposes it on the viewers or commissioners.

Article VIII of the constitution is entitled "Suffrages and Elections," and its seventeen sections all relate to elections and not to the erection of new wards in boroughs. The act of May 14, 1874, is not in conflict with any of the provisions of the constitution, and its construction or interpretation can not be affected or governed by the fact that the act of 1876 is unconstitutional.

Even if the act of 1874 is illegal, it can not vitiate these proceedings. If the court may erect a new ward in the same manner as election districts are divided—that is, without the intervention of commissioners—the court can still call in the aid of such commissioners, provided always that the application for the new ward is considered by the court and disposed of under its discretion. What better method could the court adopt to act intelligently in the premises?

And now, May 16, 1887, the exceptions are dismissed and counsel requested to draft and submit a proper decree.

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Court of Common Pleas of Montgomery County.

In re Pennsylvania Spiritual and Park Association.

On the distribution of the proceeds of a Sheriff's sale paid into court the application for an issue to try the validity of judgments claiming the fund should be made directly to the court.

When the application is made to the auditor, appointed to state a distribution, to certify an issue to the court, he discharges his whole duty when he pauses in the audit a reasonable time to enable the application for an issue to be made to the court.

Unless such application is made to the court in the manner provided by the act of Assembly the court will not of its own motion order an issue, and charge the fund in court with the expenses.

Exceptions to the report of the auditor distributing the proceeds of the Sheriff's sale of the property of the Pennsylvania Spiritual and Park Association.

J. A. Strassburger, H. U. Brunner, William F. Solly and *Jos. Fornance, Esqs.*, for exceptants.

Theo. W. Bean and *John W. Bickel, Esqs.*, for wages exceptants.

Henry Freedley, J. P. Hale Jenkins, and *Louis M. Childs, Esqs.*, contra.

The facts fully appear from the opinion of the court delivered May 16, 1887, by Boyer, P. J.

The personal property of the Pennsylvania Spiritual and Park Association, a joint stock company organized under the act of June 2, 1874, was sold upon writs of fi. fa. simultaneously issued and placed in the hands of the Sheriff. The judgments upon which these several writs of execution issued are as follows, viz.: Judgment of John Bartholomew for $678.81; judgment of B. F. Dubois for $588.50; and judgment of Henry Freedley in trust for certain creditors for $2313.45. All of these judgments were obtained by confession, and are disputed by creditors claiming liens upon the fund arising from the Sheriff's sale and paid into court for distribution. To the report of the auditor appointed by the court to state a distribution the pending exceptions were filed.

The main question discussed by counsel on the argument of the exceptions before the court was whether or not the auditor erred in refusing to certify to the court, upon the petition of parties interested in the distribution, the several issues requested by them, to determine the validity of the three judgments above described, and

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the respective amounts, if any, due upon them respectively. This application for issues was made to the auditor, and not to the court.

Under our acts of Assembly a lien creditor upon a proper application has a right to demand an issue to determine material facts in dispute touching the distribution of a fund in court arising from execution. The act of June 16, 1836, Section 87, provides that "if "any fact connected with such distribution shall be in dispute the "court shall at the request in writing of any person interested direct "an issue to try the same." * * * "Provided," as directed in the act of April 20, 1846 (P. Dig. 764, pl. 118), "that before an issue "shall be directed upon the distribution of money arising from sales "under execution or Orphans' Court sales the applicant for such "issue shall make affidavit that there are material facts in dispute "therein, and shall set forth the nature and character thereof: upon "which affidavit the court shall determine whether such issue shall "be granted, subject to a writ of error or appeal by such applicant "if the issue be refused, in like manner as in other cases in which "such writ now lies."

It is obvious from the language of the act that the application for an issue of this kind should be made to the court directly, and the auditor was right in suspending his audit for a reasonable time to allow the parties who desired the issues to make their application to the court; and in so doing he discharged his whole duty in that regard. But instead of making such application to the court the parties resumed their proceeding before the auditor, and awaited his report upon the evidence before him.

The auditor correctly held that he had no authority of himself to go behind the disputed judgments, and adjudicate upon the facts involved in the original considerations upon which the same were given.

It may not, however, yet be too late to present to the court the proper petition for an issue in the form prescribed by the act of Assembly. But it is well to pause and consider the probable result. There seems to be sufficient in the facts disclosed before the auditor to justify an issue in regard to the judgments of Bartholomew and Dubois. But the judgment of Freedley in trust for creditors seems to stand upon a different footing, and there is nothing disclosed by the evidence thus far to affect its merits. If it were sustained it would be sufficient of itself to absorb the balance of the fund in dis-

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pute, and the contestants of the other two judgments would profit nothing even from their overthrow.

Under the circumstances it is important that, if issues are insisted upon, there should be an application for the same in strict conformity to the act of Assembly in such case provided. Otherwise the court would not be justified on its own motion to order issues and subject the fund in court to the probable expenses.

Exceptions have been filed to the rulings of the auditor upon certain claims for wages; some of which were allowed as preferred claims, and others rejected. Upon this somewhat unsettled and perplexing subject the auditor appears to have exercised a sound discrimination, and we see no sufficient reason to disturb his conclusions.

Now, May 16, 1887, the exceptions are dismissed and the auditor's report confirmed, unless within five days from this date a petition for an issue or issues shall be presented to the court in accordance with the act of Assembly in such case provided; and which will then be considered.

Court of Common Pleas of Chester County.

HANNAH YEAGER VS. JOSEPH YEAGER.

In debt on a bond, absolute for the payment of money one year after date, with interest, an affidavit of defence alleging merely that at the time the bond was executed the plaintiff agreed by parol to require from the defendant the payment of interest only, and that the principal should become the defendant's at the plaintiff's death, held insufficient to prevent the entry of judgment.

RULE for judgment for want of a sufficient affidavit of defence.

R. Jones Monaghan and *J. Frank E. Hause, Esqs.*, for plaintiff.

D. Smith Talbot and *Thomas S. Butler, Esqs.*, for defendant.

The facts fully appear in the opinion of the court delivered by FUTHEY, P. J.

This suit is on a bond dated January 19, 1882, given by the defendant to the plaintiff to secure the payment of $1300 in one year after date, with interest. Receipts for the payment of interest for two

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years are endorsed on the bond. The plaintiff claims the principal and the unpaid interest.

The defendant has filed an affidavit of defence in which he alleges that the plaintiff, who is his mother, had, on the settlement of her husband's estate, in January, 1881, the sum of $3900 in money as her share of his estate in her own right; that she divided this money among her three children, taking from each a promissory note for $1300; that at the time of taking these notes she agreed that the interest thereon only was to be paid to her during her life, and that at her death the notes were to be cancelled and each child was to have as his or her share of her estate the amount of money set forth in their respective notes; that subsequently, in 1882, she took from her children their respective bonds for the same amount, to secure the notes, upon the same agreement made when the notes were given, and that the bond in suit was the one given by him; and he alleges that by this agreement the plaintiff is only entitled to recover the unpaid interest thereon.

The defendant sets up as a further defence that the plaintiff is of unsound mind by reason of advancing years, and did not cause this suit to be brought; and that proceedings have been instituted for the purpose of having her declared a lunatic, and a committee appointed to take charge of her person and estate; and that until such appointment the defendant could not safely make any payment whatever. The plaintiff asks for judgment for want of a sufficient affidavit of defence.

With respect to the last matter of defence it is sufficient to say that the proceedings referred to have resulted in finding that the plaintiff is not of unsound mind. We have, therefore, only to consider whether the other matters set out are sufficient to prevent judgment.

The question, under what circumstances will parol evidence be received to set aside or affect a solemn written instrument, has been considered in all its aspects in a large number of cases, and the rules, after some conflict, pretty definitely settled.

In Martin vs. Berens, 17 P. F. S., 459, and Malone vs. Dougherty, 29 Id., 46, several cases are cited to illustrate the circumstances under which such evidence will be received, and also when it would not be admissible. When equity would reform or set aside the instrument, parol evidence is admissible to contradict or vary the terms

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of the agreement as written. Such evidence is received in cases of fraud, accident or mistake in the execution of the instrument, and also where promises or stipulations were made at the time of the execution, upon the faith and because of which the written agreement was entered into, and without which it would not have been executed. Greenwalt vs. Kohne, 4 Nor., 369; Hoopes vs. Beale, 9 Id., 82; Rowand vs. Finney, 15 Id., 192; Thorne vs. Warfflein, 4 Out., 519; Philips vs. Meily, 10 Id., 536; Wilson vs. Underwood, 1 Chester Co. Rep., 345.

None of these matters are alleged in this affidavit of defence; the simple facts as stated are that the money belonged to the plaintiff; that her children received it from her and gave her their obligations therefor, payable in one year, with interest; and that she agreed, at the time, only to require the payment of the interest, and to let them have the principal as their respective shares of her estate at her death.

Assuming the facts to be as stated, they would not, without more, be receivable in evidence as sufficient to defeat the claim of the plaintiff. They present the simple case of parties entering into a written agreement, and one of them, afterwards, without allegation of fraud, accident or mistake, or inducement to its execution, asking the court to reform the instrument, as proof by parol that the agreement was different from that which had thus been put in writing, and to which the party asking the interference of the court had set his hand and seal.

In Grubb vs. Matlack, a Chester county case, recently decided by the Supreme Court, 2 Chester Co. Rep., 408, the court, in discussing such an offer, said: "The evidence was properly rejected; an offer to show that at the time of the execution of the lease, and immediately subsequent thereto, the lessor agreed to something in conflict with the lease, was clearly inadmissible. Such evidence would not prove accident, fraud or mistake sufficient to reform the written instrument. There was no offer to prove that the omission was through mistake, or by reason of the fraudulent character of the lessor."

The case before us comes strictly within the general rule that parol evidence is inadmissible to contradict or vary the terms of a written instrument; and there is nothing whatever alleged which

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takes it out of that rule, according to the principles governing such cases.

If the defendant desired to be in a position to avail himself of the alleged agreement, he should have written it in his bond. It is not in the power of the court now to afford him relief.

Rule made absolute and judgment directed to be entered in favor of the plaintiff for the sum of $1300, with interest from January 19, 1884, the calculation to be made by the Prothonotary.

NOTE.—The foregoing judgment was affirmed by the Supreme Court February 21, 1887, in a brief per curiam opinion.

Supreme Court of Pennsylvania.

JACKSON'S APPEAL.

A landlord not being allowed to distrain for rent until it is due, a tenant, under the general law of Pennsylvania, may lawfully sell his goods and chattels before that time, and authorize their removal from the demised premises.

The act of March 21, 1772 (Pur. Dig., p. 1012) provides that if the tenant fraudulently or clandestinely removes his goods from the demised premises with the intent to prevent a distraint for rent, the landlord within thirty days after the goods are removed can take and seize them for arrears of rent wherever found. But this does not apply where the goods have been sold *bona fide* and for a valuable consideration. Nor does it apply in any case when the goods are removed thirty days before the rent falls due.

Note provisions of local laws in Philadelphia, Pittsburg and Allegheny for apportionment of rent in case of fraudulent removal of goods by the tenant.

APPEAL of the executors of Thomas Jackson from the decree of the Court of Common Pleas of Montgomery county, dismissing bill in equity originally filed by said Thomas Jackson against Chas. K. Miller and Andrew Ervin.

The facts of the case fully appear from the opinion of the court delivered by BOYER, P. J.

The complainant in this case filed his bill in equity praying for a special injunction in the first instance, and a final injunction afterwards, to prevent the defendant from removing from the premises leased by plaintiff to the defendant (Miller) the personal property of

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the latter, then upon the demised premises, alleging that Miller had made a collusive and fraudulent transfer of the goods to the defendant (Ervin), who had advertised them to be sold on the premises on the 19th day of November following, with intent to defraud plaintiff of the rent accruing, which, however, would not be due until the first day of April ensuing, amounting to six hundred and fifty dollars. The bill also prayed for an injunction to enjoin the defendant Miller to cut certain timber, and put up fifty panels of fence.

The defendants deny the material allegations of the bill, except the lease and the amount of rent, and the date and removal of the goods from off the premises. The apprehensions of the plaintiff were naturally aroused by information of the transfer of the distrainable property upon the leased premises by Miller to Ervin, and its advertisement for sale. The transfer was made to Ervin, who was the creditor of Miller, under an agreement that Ervin should advertise and sell the goods, pay his own claim against Miller out of the proceeds, together with the expenses of sale, and account to Miller for the balance.

At the hearing of the rule to show cause why a special injunction should not issue the special injunction was refused; the defendant Miller, however, agreeing that the balance, if any, of the proceeds of the sale of the goods by Ervin remaining above the amount of Ervin's claim should be paid to the plaintiff on account of the rent falling due at the expiration of the lease. But afterwards, when Ervin had sold enough to cover his claim, Miller forbade the sale from proceeding any further. Ervin then stopped the sale and left the unsold goods upon the premises. Of this fact Ervin notified the plaintiff. Ervin therefore had nothing in hand to pay plaintiff out of the proceeds of the sale; and the plaintiff could not distrain upon the goods because his rent was not yet due. Afterwards Miller himself removed from the farm on the 21st of February, 1885, more than a month before the end of the lease. Previous to his removal he had sold and removed the whole of the remaining articles and, as he swears, delivered them to certain preferred creditors to whom he was honestly indebted and whom he felt bound to protect in preference to his landlord. The case was set down for argument by the plaintiff upon bill, and answers filed.

The plaintiff, as the case is presented, was wholly without remedy by injunction to restrain the defendants from removing the goods

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from the leased premises, as admitted by them in their answers that they did. His rent, when he filed his bill, lacked four months of being due, and it was therefore not in his power to distrain for it. Nor had the court jurisdiction to detain the goods upon the premises until the plaintiff was in a condition to distrain—not even upon well founded suspicion, or even the certainty of contemplated non-payment of the accruing rent by the tenant. The act of March 21, 1772, new Pur. Dig., p. 1012, is the law upon which we must rely. It provides that if a tenant fraudulently or clandestinely removes his goods from the demised premises with intent to prevent a distraint, the landlord within thirty days after the goods are removed can take and seize such goods wherever the same may be found as a distress for arrears of rent; provided, however, that the goods have not been sold *bona fide* and for a valuable consideration before such seizure. But it will be observed that if the goods are removed thirty days before the rent falls due the act does not apply, and it leaves the tenant free to sell and deliver the goods for a consideration at any time before the rent is payable.

Such is the general law of the state. And in Grace vs. Shively, 12 S. and R., 217, it was decided by the Supreme Court that even the clandestine or fraudulent removal of goods by the tenant before the rent is due gives no right to the landlord to follow them after it becomes due, and distrain within thirty days from the time of their removal. Our act of Assembly is the same in substance as the English Statute of George II, 2 C. 19, S. 1, under which it is held by the English authorities that its application is confined to a removal after the rent is actually in arrears. See also Jackson and Gross on Landlord and Tenant, Sec. 175, 322; Williams on Landlord and Tenant, p. 74. The goods in question, therefore, having been sold and removed from the demised premises several months before the rent fell due, the tenant had a right to do so even to the injury of the landlord.

In Philadelphia, Pittsburg and Allegheny there is a local law (see Pur. Dig., new edition, p. 1013) that if goods are fraudulently removed from demised premises with intent to defraud the landlord of his distress, the landlord can have his rent apportioned to the time of such removal, and follow and take the goods as a distress within thirty days from such removal; provided the landlord makes oath or affirmation that he verily believes the goods were carried

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away for the purpose of defrauding him. Coupled with this, however, is the proviso that goods sold *bona fide* and for a valuable consideration are excepted. If this law were applicable to Montgomery county the plaintiff would have been in a situation to test the questions raised by his bill; but under the general law he was without remedy.

Nor do I think the plaintiff's case is helped by the agreement the defendant made upon the hearing on the application for a special injunction to the effect that the balance, if any, realized by the contemplated sale of the goods by Ervin remaining in his hands after payment of his own claim and expenses should go towards the payment of the rent. This agreement was not made in consideration of the withholding of the special injunction prayed for by the plaintiff, for it was plain that no such injunction could have been lawfully issued under the circumstances. It was at most a naked promise induced by persuasion, and that was nothing to prevent the defendant Miller from stopping the sale when Ervin's claim was satisfied. He had in no wise bound himself not to do so; although it doubtless disappointed the reasonable hope of the plaintiff, for the result was that no funds came into the hands of Ervin payable upon the rent. The plaintiff, however, had lost no advantage by the nonfulfillment of his expectation; he was simply as helpless as before.

The unsold goods were afterwards left for a time on the premises, and the plaintiff was notified by Ervin of the fact. But the plaintiff was powerless to distrain, because his rent was not yet due. So the situation continued until the tenant, more than thirty days before the rent became payable, sold and removed the remainder of the goods.

Whether under the facts as disclosed in this case the law adequately protects the landlord is not the question for consideration, but whether the defendants have kept within the limits of the law in the exercise of their acts complained of. If by their answers they have successfully repelled the charges of the bill the plaintiff is concluded. Upon this ground the plaintiff's bill must be dismissed.

And now, April 26, 1886, this cause came on to be heard and was argued by counsel, and thereupon, on consideration thereof, it is ordered, adjudged and decreed as follows, viz.: that the bill be dismissed at the costs of the plaintiff, but that no costs be taxed in favor of defendants.

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Wertz & Co. vs. Collender Co.

IN THE SUPREME COURT.

G. R. Fox and *G. R. Fox, Jr., Esqs.*, for appellant.

H. K. Weand and *N. H. Larzelere, Esqs*, for appellee.

The opinion of the Supreme Court was delivered May 2, 1887.

PER CURIAM.—The facts stated and the authorities cited in the opinion of the learned Judge on dismissing the bill fully vindicate his conclusion on that opinion.

Decree affirmed and appeal dismissed at the cost of appellee.

SAMUEL A. WERTZ & CO. vs. THE H. W. COLLENDER CO.

Bailment protects the property of the bailor in the possession of the bailee from the executions of the latter's creditors, even where a concurrent agreement exists to deliver to the bailee a bill of sale for the goods when he shall have fully paid the consideration of the bailment; and this even when negotiable notes are given in advance for most of the installments falling due.

ERROR to the Court of Common Pleas of Montgomery county.

The facts of this case and argument of counsel are fully reported in the statement of the case by the court below, in 2 MONTGOMERY COUNTY LAW REPORTER, 93.

Henry A. Stevens, Esq., for plaintiff in error.

Where one has *rented* a billiard table with an agreement that when the rents paid should amount to a certain sum it should be the property of the lessee, and the table was delivered in pursuance of said contract, the table thereby vested in the lessee: Brunswick vs. Hoover, 14 Nor., 508; Price vs. McCallester, 3 Grant, 248; Forrest vs. Nelson, 16 W. N. C., 275; Stadfeld vs. Huntsman, 11 Nor., 53; Krous vs. Com., 12 Id., 418.

A claimant can not set up a limited interest after giving the Sheriff notice of an entire ownership: Myers vs. Prentzell, 9 Casey, 482; Van Winkle vs. Young, 1 Wr., 214; Stewart vs. Wilson, 6 Id., 450.

Waters having at all times after purchase exercised over them unlimited public control, upon this showing obtained credit: Martin vs. Mathist, 14 S. and R., 214; Brown vs. Keller, 7 Wr., 104; Price vs. McCallester, 3 Grant, 248.

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Acuff's Appeal.

Henry K. Weand and *William F. Solly, Esqs.*, for defendant in error.

The lease in this case is the exact lease in the formal parts in the case of Rowe vs. Sharp, 1 P. F. S., 26, which was decided to be a bailment.

This is a valid contract and can be enforced even against creditors: Myers vs. Harvey, 2 P. and W., 479; Clark vs. Jack, 7 Wr., 375; Rose vs. Story, 1 Barr, 191; Vandyke vs. Christ, 7 W. and S., 373; Henderson vs. Lanck, 9 Har., 359; Linton vs. Butz, 7 Barr, 89; Henry vs. Patterson, 57 Penna. R., 346.

As to what constitutes a bailment: Enlow vs. Klein, 29 P. F. S., 488; Becker vs. Smith, 9 Id., 469; McCullough vs. Porter, 4 W. and S., 177; Lehigh Co. vs. Field, 8 W. and S., 232.

Possession under a mere bailment for hire is not a constructive fraud: Crist vs. Kleber, 29 P. F. S., 290.

Difference between bailments and conditional sale pointed out: Stadfeld vs. Huntsman & Co., 11 Nor., 53; Brunswick & Balke Co. vs. Hoover et al., 14 Id., 508; Dando vs. Foulds, 9 Out., 74; North vs. Barr, 17 W. N. C., 425; Edwards's Appeal, 9 Out., 103.

The opinion of the Supreme Court was delivered May 2, 1887.

PER CURIAM.—It may be conceded that the line is not sharply defined between the cases which hold that a chattel held under a bailment and conditional sale will be liable to execution as the property of the bailee, and the other cases which declare the property of the vendor shall not be so liable. We think, however, this case was correctly decided under the authority of Rowe vs. Sharp, 51 Pa. St., 26, therefore

Judgment affirmed.

ACUFF'S APPEAL.

The refusal to open a decree of equity, on the ground of after discovered testimony, rests in the sound discretion of the court below, and will not be reviewed by the Supreme Court.

Where money has been paid on the strength of a decree in equity, such decree is final and can not be reopened two years thereafter.

APPEAL of Alfred S. Acuff from the decree of the Court of Common Pleas of Montgomery county in the suit between Milton New-

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berry, executor of Eliza Acuff, deceased, the plaintiff, and the said Alfred S. Acuff, defendant. In equity.

After the death of Eliza Acuff her son entered a judgment note of $6000 purporting to be signed by Eliza Acuff. The note was pronounced a forgery. Dr. Newberry, executor of the will of Eliza Acuff, filed a bill in equity asking to have it stricken from the records. At the same time Acuff was arrested, tried and convicted in the criminal court of the forgery of this note, but before sentence fled the jurisdiction. The testimony taken at the criminal trial was, by agreement of counsel, considered as taken before the master and a decree entered December 3, 1883, by BOYER, P. J., that the judgment be stricken from the record.

Subsequently Acuff returned and was sentenced to ten days imprisonment and $500 fine, which sentence he served. On September 23, 1885, Acuff presented his petition asking for a reopening of the equity case, alleging after-discovered testimony to disprove the forgery.

After taking depositions in support thereof the petition was refused by a decree filed March 1, 1886, by BOYER, P. J.

In the matter of the petition of Alfred S. Acuff, presented September 28, 1885, and rule granted thereupon to show cause why the decree in said equity suit made and entered December 8, 1883, should not be opened, etc.

Now, March 1, 1886, the testimony taken by the defendant in support of the above stated rule being mostly inadmissible and altogether unsatisfactory to establish that any injustice has been done him, and it being admitted that the executor of the last will and testament has fully accounted for and distributed the estate of Eliza Acuff upon the faith of said decree and in accordance with said will, the petition of the said Alfred S. Acuff is refused and the rule thereupon granted is discharged at the costs of the petitioner.

George N. Corson and *H. B. Dickinson, Esqs.*, for appellant.

G. R. Fox and *Charles Hunsicker, Esqs.*, contra.

The opinion of the Supreme Court was delivered May 2, 1887.

PER CURIAM.—The appeal from the first decree was not taken in time to authorize us to review it under the statute. The refusal of the court to open the decree rests in the sound discretion of the court, and the record shows no fact which will permit an appeal to lie. Appeal quashed.

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Orphans' Court of Montgomery County.

Estate of Mary Ann Corson, Dec'd.

Upon an appeal from the Register admitting a will to probate the Orphans' Court will not grant an issue to be tried by a jury unless testimony is furnished by the appellant sufficient, standing by itself, to sustain a verdict against the will.

Issue refused in this case because of the insufficiency of the evidence to sustain a verdict against the will upon the ground of testamentary incapacity or undue influence.

Appeal from the Register of Wills admitting to probate the alleged will of Mary Ann Corson, dec'd.

For the former opinion of Judge Boyer see 2 Montgomery County Law Reporter, 173.

G. R. Fox & Son, Esqs., for appellants.

Charles Hunsicker and *Joseph Fornance, Esqs.*, contra.

The facts fully appear from the opinion of the court delivered June 6, 1887, by Boyer, P. J.

In the opinion of the court filed November 22, 1886, an issue was refused, upon the ground that there was not sufficient evidence before the court to justify the award of an issue; but with leave to the appellant to make application for the appointment of an examiner to take further testimony. Such application was accordingly made, and an examiner appointed; and now, upon the testimony taken before the examiner, the application for an issue to try the validity of the disputed will is again before the court. The will is assailed upon two grounds, viz.: alleged testamentary incapacity of the testatrix; and that the testatrix was induced to make the will by the exercise of undue influence on the part of John Q. McAtee, the executor named therein.

All the Pennsylvania authorities agree that to justify the direction of an issue by the Orphans' Court in such a case the evidence before the court ought to be sufficient, standing by itself, to sustain a verdict against the will. Otherwise to grant an issue would be merely a waste of public time in the trial, and subject parties to injurious delay and unnecessary costs. See Cozzen's Will, 11 P. F. S., 196; Graham's Appeal, Id., 43; DeHaven's Appeal, 25 P. F. S., 337; Knight's Appeal, 7 Harris, 493; Knaus & Seipt's Appeal, 18 W. N. C., 138; Winpenny's Appeal, 8 Id., 415; Burden's Estate, 11 W. N. C., 138; Harrison's Appeal, 4 Out., 458; Eckert vs. Flowry, 7 Wr., 46; Will of Elizabeth Hoge, 2 Brews., 450.

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Have we such evidence before us in the present case?

I. As to the testamentary capacity of the testatrix.

The will was drawn under the personal direction of the testatrix by Joseph Fornance, Esq., a lawyer of excellent repute and standing, who had before acted as her counsel, and had known her personally during many years. He was one of the subscribing witnesses to the will; and his testimony is clear and positive as to her mental soundness at the time the will was executed. The other subscribing witness, who was called in for that purpose, saw the testatrix then for the first time; but on being introduced had a conversation with her of some length, and testifies to his conviction of her sound mental condition. Upon that occasion she brought with her a will which had been executed by her about a year before, and explained to Mr. Fornance the alterations she wished to make in her new will, and her reasons for the same. These were all such as might reasonably influence a sound mind; and she showed a full understanding of her estate and her surroundings.

To establish her incapacity to make a valid will five witnesses, besides the appellant, have been called, whose aggregate testimony at the most shows little more than that the testatrix had some eccentricities. She decorated her room with numerous pictures, and with festoons of paper-flowers made by herself. She spotted her ceiling with indigo blue, and thought it handsome. She bought more lamps than she needed, as well as other useless articles, and sometimes paid for them more than they were worth. She sometimes in the estimation of the witnesses talked foolishly; and was untidy as a housekeeper. This is the sum and substance of the testimony to sustain the charge of testamentary incapacity. Admitting it all to be true, what of it? Nothing appears to cast a doubt upon her knowledge of the exact nature or extent of her property, or of her relationship with those around her. She attended in a satisfactory manner to the wants of her mother, the appellant, who was old and blind, as the appellant herself testifies, and who concedes the mental capacity of the testatrix. Anxious as the appellant seems to set aside her daughter's will, when her attention was called to the testimony of witnesses who said the testatrix was weak-minded, she testifies, "I can not say she was weak-minded, and I am not going to say it neither. If I lose all I have got I will not say it."

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It is incumbent on the party alleging mental incapacity to establish it affirmatively; the presumption of law being in favor of testamentary capacity. Nor is the test of testamentary capacity of a high intellectual standard. "The test of capacity is that the testator's mind and memory were sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed his will." This is the standard of capacity adopted by the Supreme Court in Thompson vs. Kyner, 15 P. F. S., 368. See Grubbs vs. McDowell, 10 Nor., 236. "And as a general proposition less capacity is sufficient to make a valid will than to transact ordinary business": Thompson vs. Kyner, *supra.*

It is plain that the evidence furnished by the contestant would not be sufficient to sustain a verdict against the will on the ground of the testamentary incapacity of the testatrix.

II. It remains to be considered whether as the testimony stands there is sufficient to justify the court to send the case to a jury to try the question of undue influence.

What is undue influence? It is laid down in Eckert vs. Flowry, 7 Wr., 46, that "that is undue influence which amounts to constraint "which substitutes the will of another for that of the testator. It "may be either through threats or fraud; but, however exercised, "it must, in order to avoid a will, destroy the free agency of the tes- "tator at the time when the instrument was made." In the language of Justice Woodward in McMahon vs. Ryan, 8 Har., 329, "it must "be a present constraint operating upon the mind of the testator in "the very act of making the testament."

In the case at bar there is not to be found the slightest evidence of any influence exerted by any one over the testatrix which could be brought within these definitions. On the part of Mr. McAtee, the person accused, there is no proof of any misrepresentation, threat, or coercion of any kind, at any time practiced by him upon the testatrix. Nor indeed is there any proof even of persuasion on his part in regard to the disposal of her estate. Whatever persuasive influence he may have used does not appear in the proof. Whatever opinion might be entertained upon this subject can not rest upon anything else than suspicion. That he had influence over her if he chose to exert it would be a natural conclusion. He was her man of business and confidential adviser. The situation of the two ladies, the testatrix and her mother, seemed to require the kindly attention

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of some intelligent friend. Occupying that position the frequency of McAtee's visits to their home may readily be accounted for without the imputation of craft. And this relationship may also account for the gratitude of the testatrix in making him a legatee by her will; and that he who best knew her affairs should be the executor of her will was her natural desire. He did not draw the will; and there is not the slightest proof that it was made at his dictation.

The circumstances in evidence show that the distribution of her estate by the will was such as might have been expected from what we know of her character and disposition. To her mother, who had been her care in life, she left the whole of her estate during her lifetime. Besides her mother she had no relatives towards whom she seems to have stood upon terms of close friendship or intimacy; and the first bequests in her will to take effect after the death of her mother are for religious or charitable uses, and which in the aggregate amount to two thousand dollars.

The chief reason for the appellant's opposition to the will, and for her belief in the craft of McAtee having been unduly exerted upon the testatrix, appears from her testimony to be the fact that the will gives her but a life estate, without the power to dispose of the *corpus*. Yet the will executed by the testatrix about a year before, and of which the appellant had approved, gave her precisely the same estate. But then, doubtless, the contingency of her surviving her daughter was considered by her too remote to be seriously apprehended.

In Eckert vs. Flowry, *supra*, the court below was reversed for ordering an issue upon this point when there was no evidence to support the charge; and the Supreme Court, through Justice Strong, used the following language: "Unless, therefore, there was some "evidence tending legitimately to prove some fraud had been prac- "ticed upon the testatrix at that time" (the execution of the will), "or some misrepresentation had then been made, or some physical "or moral coercion had been employed, such as to destroy her free "agency, the court erred in submitting to the jury the question "whether undue influence had been exerted. It was inviting them "to find a fact of which there was no evidence, and which the law "as well as reason presumed had no existence."

In Harrison's Appeal, 4 Out., 458, the court below was affirmed for refusing an issue in a similar case to this.

And now, June 6, 1887, the application for an issue is refused and the appeal dismissed.

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Court of Common Pleas of Montgomery County.

AMBLER VS. BAYLY. HORNER ET AL. VS. BAYLY.

Testator directed that the balance of his estate be deposited in bank by his executor, "and to pay unto my son * * and daughter * * each such sum on the first day of each month as shall exhaust their respective shares by the first of July, 1888. * * I further direct that at no time shall any of the above devises * * be in any way liable to be attached or subject to any execution process whatever by any creditor or creditors of either of my said children." Creditors of the son attached the money in the hands of executor.

Held, that the testator created an active trust. Neither the principal fund nor any installment is attachable at the suit of a creditor of the beneficiary.

MOTION to dissolve attachment execution.

D. O. Rogers, Esq., for Geo. W. Rogers, Esq., garnishee.

Montg. Evans and *J. A. Strassburger, Esqs.*, for plaintiffs.

The facts fully appear from the opinion of the court delivered June 20, 1887, by SWARTZ, J.

Thomas P. Bayley made his last will and testament, and in the fourth item thereof directed as follows:

"Fourthly, as to the balance of my personal estate not herein-
"before bequeathed I direct my hereinafter named executor to have
"the same deposited in bank, and not put the same at interest; and
"to pay unto my son John Thomas and my daughter Rebecca each
"such sum on the first day of each month as shall exhaust their re-
"spective shares of my personal estate by the first day of July, 1888,
"provided that neither of my children shall receive more than one-
"half of my personal estate in the manner above directed. And
"should either of my said children die before they have received
"their full half part of my said personal estate, then I direct that the
"remaining part of said half of the one so dying shall be paid to his
"or her children, share and share alike; but if the one so dying shall
"leave no children, then the said part as aforesaid remaining shall
"be paid to the children of the survivor, share and share alike. And
"I further direct that at no time shall any of the above devises and
"bequests, whether of real or personal estate, be in any way liable
"to be attached or subject to any execution process whatever by
"any creditor or creditors of either of my said children, but shall be

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"paid into the hands of my said children by my executor, and his "or her own proper receipt shall only be a discharge unto my said "executor; and the share as aforesaid of my daughter Rebecca shall "in no way be liable to any control or claim on the part of her pres- "ent or any future husband."

George W. Rogers, Esq., was made executor of said will. He deposited the balance of the personal estate in bank, as directed by the will. The son John Thomas incurred debts. Judgments were entered against him and executions issued. The Sheriff attached the moneys in the hands or control of the executor to satisfy said judgments.

Is this fund or any part of it attachable? Two monthly payments are now due, and the executor retained them to await the result of these suits.

The testator manifestly intended that his son and daughter should enjoy the balance of his personal estate in monthly installments, and that it might be certainly secured to them he directed that the fund should not be attachable or subject to any execution for their debts. Nor were they to pledge, anticipate or assign these monthly installments; the assignee had no power to collect them; the money was to be paid "into the hands of the children by the "executor, and his or her own proper receipt only to be a discharge "unto the executor."

Trusts on behalf of improvident and insolvent children are favored and sustained by the law. In Eynick vs. Hetrick, 1 Harris, 491, the court say: "The fact that the conveyance was made to as- "sume the form of a trust, and for the special purpose of keeping "John's creditors at bay, makes nothing against its validity so far "as the latter are concerned, for neither policy nor equity prohibits "a parent to make such provision for the maintenance and comfort "of an insolvent child; on the contrary, these trusts are favored and "sustained by the law as suggested by the best feeling of our nature "and doing harm to no one."

That personal property may be put in trust to protect it against the improvidence of the beneficiary is shown in Holdship vs. Patterson, 7 Watts, 551, where the court said: "A benefactor may cer- "tainly provide for a friend without exposing his bounty to the debts "or improvidence of the beneficiary. He has an individual right of "property in the execution of the trust, and to deprive him of it

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"would be a fraud on his generosity." In this case Julia Patterson received $2,600 cash in trust to invest in business, and use the profits for the maintenance of her father and his family.

Nor can it make any difference that the trust relates to the distribution of the principal fund and not to its income. In Keyser vs. Mitchell, 67 P. S. R., 476, the trustee had the absolute discretion as to what part of the income or corpus should be paid to the *cestui que trust*, and the property as well as its income was protected against attaching creditors. If the testator can vest in the trustee such unlimited discretion as to the distribution of the corpus, why can not the testator himself apportion the fund, direct its distribution, and protect it in the hands of a trustee against the improvidence of his son by a clearly expressed intention to that effect? The father may understand the wants, weaknesses and necessities of his son far better than any trustee he can appoint. We can see no good reason why the trust of a principal sum and a trust of income should not be governed by the same rules.

The argument of the attaching creditors makes this but a dry or passive trust, and if they prevail against any installment now due they must also prevail against the entire fund. We think the testator stamped a trust upon the balance of his personal estate. Why is the executor to have the control of the fund if not to protect it from creditors? What other purpose can the trust subserve? If this purpose does not prevail, then the office of the trustee is entirely useless, and he must hand over the money to the *cestui que trust* without delay.

Let us try the test given in Barnett's Appeal, 46 P. S. R., 399: "Whenever it is necessary for the accomplishment of any object of "the creator of the trust that the legal estate should remain in the "trustee, then the trust is a special, active one." See also Rife vs. Geyer, 59 P. S. R., 396; Holdship vs. Patterson, 7 Watts, 551.

"It is necessary that the legal title should remain in the trustee to be asserted by him in the event of a seizure and sale on execution by creditors." This is the sole purpose of the trust, but this is sufficient of itself to sustain it. Kay vs. Scates, 37 P. S. R., 37.

We are therefore of opinion that a special active trust exists, and the words of the trust are sufficient to protect it against creditors of the beneficiary. See Thackara vs. Mintzer, 100 P. S. R., 151;

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Philadelphia Trust Co. vs. Guillon, Id., 254; Carmichael vs. Thompson, 5 Central R., 501.

In the case at bar, as in Barnett's Appeal, *supra*, there is a special trust which gives John Thomas no more than the right to enforce in equity the intention of the testator to the extent of his interest. He may enforce the payment of an installment, but until paid into his hands he and his creditors have no control over the fund.

And now, June 20, 1887, the attachments are dissolved.

Court of Common Pleas of Luzerne County.

BRADER VS. CONNIFF.

The incidents of a judgment in trespass being the same as of a judgment in trover, the proceedings of a justice will not be reversed because of a technical mistake in the form of action.

CERTIORARI.

Q. A. Gates, for plaintiff.

John T. Lenahan, for defendant.

The opinion of the court was delivered December 6, 1886, by RICE, P. J.

The defendant was summoned to answer the plaintiff "in a plea of *trespass in damages* not exceeding three hundred dollars." The parties appeared and went to trial, the plaintiff claiming and recovering a judgment of five dollars "for damages done to his personal property by defendant unlawfully detaining and milking plaintiff's cow." The exceptions are to the effect that the plaintiff's remedy was by an action of trespass on the case, and therefore the justice did not have jurisdiction. The argument of counsel is that the presumption is that the cow came lawfully into the defendant's possession, and that the damages arose from the unlawful detention. A justice in stating the plaintiff's cause of action is not held to the strict rules of special pleading, and it is quite possible in this case that the justice used the word "detaining" in one of its popular

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meanings ("to restrain from proceeding; to stay or stop": Webster), or in place of one of its synonyms ("to stop; stay; arrest; check; retard; delay; hinder": ibid), without a proper appreciation of the nice distinction which the rules of pleading make between an unlawful taking and an unlawful detention of property. But, assuming that the transcript is to be understood in the precise sense claimed by counsel, it does not follow that the justice did not have jurisdiction. As the counsel for the defendant pertinently answers, the justices of the peace have jurisdiction of actions of trover and conversion, and one of the instances of conversion which will support the action is a wrongful detention. 1 Ch. Pl., 153. Having jurisdiction of the cause of action, and the incidents of a judgment in trespass being the same as of a judgment in trover and conversion, the proceedings ought not to be reversed because of a technical mistake in the form of action.

The exceptions are overruled and the judgment is affirmed.

Court of Quarter Sessions of Montgomery County.

In re Beechwood Avenue, Jenkintown Borough.

Jurisdiction of the Court of Quarter Sessions over proceedings to lay out and open streets by ordinance of the town council in boroughs incorporated under the general borough law; upon complaint made by a person aggrieved.

Conflicting decisions in regard to the right of the Burgess in such boroughs to take part in the proceedings of the town council.

There being a tie vote on an amendment offered to an ordinance, the Burgess as presiding officer gave his casting vote in favor of the amendment, and declared it adopted. The ordinance as amended was then passed by a majority vote of the members of Council. *Held*, that it was immaterial whether the Burgess had a right to cast his vote on the passage of the amendment or not, after the final adoption of the ordinance as amended by the votes of a majority of the members of Council present at the time, and constituting a *quorum*; that the enactment of the ordinance being like an act of Assembly a legislative and not a judicial proceeding, could not be invalidated by some irregularity permitted in the earlier stages of the bill.

Complaint of Richard J. Dobbins and Philip Spaeter, land owners, through whose lands a certain street called Beechwood avenue was laid out by virtue of an ordinance passed by the Town Council of the borough of Jenkintown on the 25th day of October, 1886.

Chas. H. Stinson and *Chas. Hunsicker, Esqs.*, for complainants.
N. H. Larzelere and *M. M. Gibson, Esqs.*, for borough.

The facts of the case are fully disclosed from the opinion of the court delivered June 6, 1887, by Boyer, P. J.

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Beechwood Avenue.

The first specification of the complaint is that the Town Council did not obtain the consent of the land owners; nor provide for a just compensation.

The answer to this is that the consent of the land owners is not required, the Legislature having by the general borough law, under which the borough of Jenkintown was incorporated, conferred upon borough councils the right to lay out public streets within the limits of their respective boroughs; and for this purpose they are invested with the right of eminent domain: and the assessment of damages in compensation of those injured, and of contribution from those benefited, is provided for; and until this has been done, and the damages paid or secured, the street can not be opened. A jury of viewers for this purpose was duly appointed, and their report filed according to law.

There are seven other specifications in the complaint, which may be summed up in the following averments, viz.: that the street as proposed by the ordinance is unnecessary; that it will entail great expense upon the tax-payers of the borough without any corresponding benefit, and that the finances of the borough do not justify the expense; that citizens are sufficiently accommodated by other convenient streets; that the proposed avenue runs at acute angles over other streets, is not straight, and not in conformity with other streets already adopted; that a large number of taxables and residents of the borough, if not a majority, are opposed to it; and that it will greatly injure the properties of the complainants.

The proceedings in this case are under the general borough law of 1851 as amended by the supplement of May 22, 1883. P. Dig., 212, pl. 137. By the terms of the law as amended express and conclusive power is given to the Court of Quarter Sessions to entertain, and decide, any complaint made by a "person or persons aggrieved in consequence of any ordinance, regulation, or act done, "or purporting to be done, by virtue of this act." The late case of Appeal of the Borough of Chartiers, reported in Weekly Notes of Cases, Vol. XIX, p. 46, etc., shows the extensive supervisory jurisdiction which the Supreme Court decides has been conferred upon the Court of Quarter Sessions in such cases by the act of 1883.

We have carefully reviewed the voluminous testimony submitted on both sides to discover wherein the complainants are likely to sustain grievances by the opening of the street in question, which

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entitle them to the protection of the court. The weight of the evidence is that the street is needed for the accommodation of the general public; that it will afford to a large proportion of the residents of the borough a more direct and convenient access to the railroad station, and relieve those engaged in business operations from the restrictions under which they now labor in the transportation and landing of freight; that although the street as laid out winds around a curve in approaching the railroad station, and will be subject to some necessary grading, the evidence seems to indicate that it is laid out upon the best practicable route to attain its most desirable public purposes. One of the complainants, at least, will suffer considerable damage, but not to an irreparable extent, and for which he will be entitled to just compensation. If we may judge of the amount of damages to be paid from the report of the viewers who were appointed, as provided by law, to assess the same, and which is now before the court, then, after deducting the contributions assessed to those benefited, there will remain a balance of less than $600 to be paid by the tax-payers of the borough in general; and the complaint that it will be too expensive to open the street, at least so far as the damages to be paid are concerned, is not sustained. The grading would be an additional expense, of which we have no estimate as to cost; but Joseph W. Hunter, the borough surveyor, called and examined by the complainants, testifies (see p. 43 of the complainants' testimony) that "the grading of the avenue from beginning to end is entirely feasible and easy." It is impossible to conclude from a careful examination of the facts disclosed by the testimony that there has been any such grievance suffered by either of the complainants that would justify the court in interfering with the proceedings upon the merits.

There was, however, a technical objection raised upon the argument touching the validity of the ordinance (although not enumerated among the specifications of the complaint), which perhaps it may be well to notice. It appears from the evidence that after the introduction of the ordinance in Council, and it had passed two readings, a member moved an amendment, so as to cause the ordinance to provide that the said street should be "laid out, placed on the borough plan, *and opened*," instead of "*laid out, and placed on the borough plan.*" A ballot was taken on the amendment, which resulted in a tie, two of the four members present voting in the affirm-

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ative and two in the negative; whereupon the Burgess, who is the presiding officer of the Jenkintown Council, cast a vote in favor of the amendment, and it was declared adopted; after which the ordinance as amended was put upon its final passage, when the ballot resulted in its adoption, three members of the Council present voting in the affirmative and two in the negative. The contention is that the ordinance is invalid, having been amended by the unlawful vote of the President.

It was held by the Common Pleas of Chester county, Butler, P. J., in Price vs. Beale, 34 Leg. Int., 242, that the eighth section of the act of April 1, 1834, P. L. 165, was not repealed by the act of 1851, although omitted from the Digest. It provides that "the meet-"ings of said town council shall be held at such times and places as "the majority of them may appoint, and the burgess shall be presi-"dent of the town council, and shall have and exercise all the rights "and privileges of a member thereof; but in case of the absence of "the burgess the members present may elect one of their number "to preside for the time being."

The contrary was held by Judge Pershing in Com. vs. Kepner, 10 Phila. R., 312, 30 Leg. Int., 312. There has been no decision on this point by the Supreme Court. It is a common custom in boroughs incorporated under the general law for the burgess to act as president of the town council, but not as a voting member. Whether he is entitled to a vote in the event of a tie, as accorded to him by the Jenkintown Council, is not in the opinion of the court a material point in this case. The vote he cast upon the amendment of the ordinance was not disputed by the opponents of the amendment; and the ordinance as amended was regularly enacted by the votes of a majority of members of Council present at the time, and constituting a *quorum;* and was accepted and published as an ordinance of the borough. It is too late now in a collateral proceeding to nullify the ordinance for an irregularity in the voting upon an amendment acquiesced in at the time, and cured by the subsequent lawful passage of the ordinance as a whole. The enactment of the ordinance was a legislative, not a judicial, proceeding (see Dillon on Municipal Corporations, §59, §465, and cases cited); and no law enacted by a legislative body can be invalidated by some similar irregularity permitted in the earlier stages of the bill. No such inquiry was ever allowed for the purpose of abrogating a law.

And now, June 6, 1887, the complaint of the complainants is dismissed.

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Court of Common Pleas of Montgomery County.

PERTH AMBOY TERRA COTTA CO. vs. ARDMORE WOOD WORKING CO. AND ALFRED H. GREEN.

Competency of witnesses to prove a partnership after the death of one of the partners, considered: creditors are incompetent, employes of creditors are competent.
One partner can confess judgment that will bind partnership property only where it was for a firm debt, not where it was for money loaned the partner individually, and by him expended in the business of the firm.
The name and style "The Ardmore Wood Working Co." indicates a partnership.
The failure to register the partnership does not prevent either partner from alleging it at any time.

RULE to show cause why judgment should not be opened as to the Ardmore Wood Working Co. and defendant let into a defence.

Joseph Fornance, Esq., for rule.

Montg. Evans, Esq., contra.

The facts fully appear from the opinion of the court delivered June 6, 1887, by SWARTZ, J.

Edward C. Wood, the petitioner, alleges that Alfred H. Green entered into copartnership with him under the name and style of "Ardmore Wood Working Co."; that the said Green without the knowledge of Wood executed a bill single to the Perth Amboy Terra Cotta Co., signing thereto "Ardmore Wood Working Co." and "Alfred H. Green"; that judgment was entered upon this bill single and execution issued; that the judgment so confessed was for the individual debt of said Green, and not for money furnished to the copartnership.

Does the testimony offered establish the alleged partnership?

Upon page 364 of the letter-book produced we find the copy of a letter written by Green to one Shannon on the 13th day of May, 1886. Mr. Green writes: "I did not advertise for a partner as yet, "as I was not sure of the mill, but I will advertise to-morrow or "next day." Two days afterward, on May 15th, Alfred H. Green and Edward C. Wood executed a lease for the mill spoken of in the above letter.

It will not do to say that Wood signed as a surety for Green. If that was the purpose of the signature we should find it appended to the printed form provided in the lease. The lease indicates that Green and Wood were equal partners in the Ardmore mill, the place where the business of the Ardmore Wood Working Company was conducted.

On and after the 15th day of May we find numerous letters written by Green relating to the business at the Ardmore mill, in

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which he uses the personal pronoun *we* in speaking of the undertakings of the concern. Letters relating to mill work are signed, some "Ardmore Wood Working Company, Alfred H. Green, Manager," others "Alfred H. Green & Co.," and still others "Alfred H. Green, Manager." On the 10th of June, 1886, an agent of Bradstreet's commercial agency called on Green. He was informed by him that Alfred H. Green and Edward C. Wood were partners in the lumber business at the Ardmore mill.

A card was offered in evidence with the words "Ardmore Wood Working Company, Alfred H. Green, Manager," printed on its face, and the words "Co. Edward C. Wood 1131 N. 41 st." endorsed on the back in lead pencil in the handwriting of Green.

By the death of Green his creditors are incompetent to testify in this case. Karns vs. Farmer, 66 P. S. R., 297; Hanna vs. Wray, 77 P. S. R., 27. And this incapacity includes Edward C. Wood.

Abbot H. Chase, however, is competent. He was an employe of one of the creditors of the Ardmore Wood Working Company, and testifies that Green spoke of Wood as a member of the firm, and that Wood was about to put $5,000 more in the business.

We can not lose sight of the fact that Wood is the applicant to have the judgment opened. He calls witness in support of the alleged partnership. In the testimony before us Green confesses the existence of the partnership, and Wood now asks that his confession be accepted as the truth.

But it is claimed that even if the partnership is admitted the judgment should not be disturbed, because the confession was for money used by the firm in the partnership business.

Partnership property may be sold under an execution upon a judgment confessed by a single partner in the firm name and for a firm debt. Ross vs. Howell, 3 Norris, 129. Where, however, such confession is for an individual debt it is fraudulent against all partners who did not consent thereto; nor is it sufficient to show that the judgment so confessed was for money loaned to the individual member of the firm upon his credit and by him expended in the business of the firm. In such a case there is no priority of contract between the claimant and the firm, and there could be no recovery against the firm. To make the claim valid against the partnership the partners must assume it. Donnelly vs. Ryan, 5 Wright, 306; Brook vs. Evans, 5 Watts, 200. Such assumption may be inferred if the other members of the firm knew the money went into the bu-

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siness and consented to it. Graeff vs. Hitchman, 5 Watts, 454; Clay vs. Cottrell, 6 Harris, 408. It is not sufficient to show that the consideration money for the judgment went into the firm. The authorities cited by the plaintiff on this point are all cases where the partners united in the confession of the judgment or assumed the debt as a partnership liability. Rees et al. vs. Keystone Shoe Co., 18 W. N. C., 565; Seigel vs. Chidsey, 4 Casey, 279; Walker vs. Marine Bank, 2 Out., 574; Lent vs. Shultz, 37 Leg. Int., 426; and Coffin vs. Hurlburts, 15 W. N. C., 52, were contests between creditors, not between the partners themselves.

There is no testimony to show that Wood knew that the money received from the Terra Cotta Company by Green, as their agent, was used by the firm or that he assented to such use. It does not clearly appear that the money was so used. It was deposited in the name of Alfred H. Green. The money was mingled with his own, some of it no doubt was used at the Ardmore mill. A number of the checks produced by plaintiffs are drawn to "A. H. G." or bearer. Who received the money drawn on some of these checks does not appear.

The failure to register the partnership can not affect this case. There is no attempt to show that the plaintiffs gave credit to Green as the owner of the Ardmore milling business. Green embezzled the money; it never was loaned to him. The very name and style of the business indicated a partnership or corporation. Callender and Robinson, 96 P. S. R., 454, we think has no application.

It is also urged that the rule was improvidently granted upon the application and affidavit of Wood because of his incapacity as a witness. The application was properly made by him; it is doubtful whether the creditors had any standing to petition. Grier vs. Hood, 1 Casey, 432. The weight of the evidence before the court is with the applicant, and he is entitled to an issue.

And now, June 6, 1887, an issue is awarded to ascertain the following facts: First, whether Alfred H. Green and Edward C. Wood were copartners in the lumber business at the Ardmore mill on the 8th day of October, 1886, at the time the judgment was confessed; and secondly, if at that time such copartnership did exist, what, if anything, was due by said firm upon the judgment confessed to the Perth Amboy Terra Cotta Works, in which issue the said Edward C. Wood shall be made plaintiff and the said Perth Amboy Terra Cotta Company defendant, all proceedings on the judgment to stay in the meantime.

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Court of Common Pleas of Luzerne County.

FINKLESTEIN VS. FINKLESTEIN.

An account and a receiver will not be allowed after the dissolution of a partnership upon the application of one of the partners, because he has not been indemnified against the indebtedness of the firm, no covenant for indemnity being contained in the agreement of dissolution and no demands made for payment of such indebtedness.

MOTION for injunction.

Michael Cannon, Esq., for plaintiff.

G. L. Halsey, Esq., for defendant,

The opinion of the court was delivered March 7, 1887, by RICE, P. J.

There are cases to show that equity will decree the performance of a general covenant of indemnity, though it sounds only in damages, upon the principle on which the court entertains bills *quia timet.* Ranelaugh vs. Hayes, 1 Vern., 189; Champion vs. Brown, 6 Johns. Ch., 398, 406; Mitford Eq. Plead., 148; 2 Lindley on Partnerships, 768; 2 Storey, Eq. Jur., 48, 170. But, on the other hand, it has been held that the engagement can not be specifically enforced before the damage has accrued which gives rise to the right of indemnity. See Hughes Hallett vs. Indian Mammoth Gold Mines Co., 22 Ch. Div., 561, in which the authority of Ranelaugh vs. Hayes, *supra*, is decided. Be that as it may, and even assuming that the plaintiff would be entitled to a decree that the defendant give security against the debt of the partnership, no such decree can be entertained until after final hearing. And, as the plaintiff saw fit to transfer his interest in and possession of the goods of the firm to the defendant absolutely, upon the defendant's personal undertaking, without security, we can find no authority for taking them out of the defendant's possession by the appointment of a receiver, or restraining him from disposing of them in the absence of proof that the plaintiff is being called on for the payment of the debts in question and that the defendant is not carrying out his agreement in good faith. We will not embarrass the case by intimations as to what would be the power of the court if such a state of facts should be made to appear.

The motion for injunction is denied without prejudice.

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Court of Common Pleas of Montgomery County.

NORRISTOWN PASSENGER RAILWAY CO. vs. CITIZENS PASSENGER RAILWAY CO.

A street railway company granted the use of a street by borough council does not, by resolution of the Board of Directors fixing a location for their projected tracks, acquire any right as against a second road invested with like privileges, if the latter makes the first actual entry upon and occupation of the street.

Section 1, Article 17, of the Constitution, authorizing one railroad to *connect* with another, does not apply to passenger street railways.

The use of the tracks of one street passenger railway by another can be regulated by the town council.

The word "city," in the act of May 22, 1878, P. L. 115, Section 15, held to include and be binding on boroughs as well.

MOTION to dissolve injunction.

The plaintiff company by ordinance of the Town Council of Norristown, June 2, 1884, was given permission to occupy certain streets in said borough, amongst others Main street. They did lay their track upon two and a half squares, from Mill street to Music Hall, and have been using them since. After the defendant company had been chartered, the Board of Directors of plaintiff company resolved to extend their road on the centre line of Main street from Ford to Swede street. Before any entry was made, however, defendant company located at the same place and laid their track, whereupon the present bill was filed.

Joseph Fornance and *Charles Hunsicker, Esqs.*, for motion to dissolve.

Henry Freedley, Esq., contra.

The facts of the case fully appear from the opinion of the court (Judges BOYER and SWARTZ being stockholders of said companies could not act) delivered July 1, 1887, by MITCHELL, J.

I. The first part of the prayer of the bill is to enjoin defendant from using the *location* of complainants on the centre of Main street from Ford to Swede.

From Mill street to the Music Hall the tracks of complainant are already laid in the centre of the street, but upon the rest of the proposed route the only location is by a resolution of the stock-

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holders passed March 15, 1887, fixing the centre of the street as the place of the projected tracks.

Both companies are organized under the act of May 23, 1878, P. L. 111. Neither charter fixes the portion of the street to be occupied by the tracks, nor did the Borough Council do so in either of its ordinances giving consent to the building of the roads. Complainant therefore was at liberty to select such part of the street as it thought best. But its grant was not exclusive, and when the respondent company was authorized also to lay its tracks it could use any part of the street not already occupied.

A mere paper location by the vote of the stockholders is not binding on any one but the officers and servants of the company, and gives no right as against the second road if the latter makes the first actual entry upon and occupation of the street. "*Mere line running*," says Harding, J., in Wilkesbarre, &c., R. R. Co. vs. Danville, &c., R. R. Co., 29 Leg. Int., 274, "can not in any sense be recognized as *locating* a railroad. Even though the defendants profiled it, though they spread it over elaborate maps *and adopted it as the location of their road*, it lacked at the very threshold every legitimate element to give it force."

On the first prayer, therefore, I am of opinion that complainant has shown no right to the relief asked. The Borough Council might have fixed the respective locations of the two roads, or still may, but failing to do this the respondent may select its own location. Holding this view it is not necessary to consider some of the points made at the argument. It is doubtful if the act of March 19, 1879, P. L. 9, applies at all to boroughs, but if it should it is only a reasonable interpretation that the consent of the Council to the extension of the time of construction may be given in advance.

II. The second prayer asks an injunction against connecting respondent's tracks with the tracks of complainant already laid.

Respondent has not shown any authority to do this. It may well be doubted if Section 1 of Article 17 of the Constitution, in authorizing any railroad to *connect* with another, meant to authorize the appropriation of an integral part of the other's essential scheme or project. But however this may be, it was held by Judge Ludlow in Shipley vs. Railway Co., 13 Phila., 128, that, except a few sections, this article does not apply to passenger railways, and this view

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has been followed at the present term by my own court in Gyger vs. Railway Co., not yet reported. This much of the injunction must therefore be continued.

III. The third prayer is to enjoin respondent from entering upon and using the complainant's tracks.

Complainant, as already said, not being limited by the charter or ordinance, could lay its tracks on such part of the street as it thought best. Having done so, its tracks can not be interfered with unless by some necessary or express authority.

Authority is asserted under Section 15 of the act of May 23, 1878, P. L. 115. The language of that section is, "The councils of *such city* shall have power," etc. It is, however, quite clear that this includes a borough council. The title of the act, which, under the existing Constitution, is an essential part of it, includes "cities of the third, fourth and fifth classes, boroughs and townships." The presumption is, therefore, that all of the sections apply to all of these bodies unless a contrary intent be manifest from the language. It is notable that the entire act contains but three references to the place wherein the railway is to be located. The first eleven sections, the main body of the act, containing the provisions for the articles of association, the corporate powers, capital stock, etc., are entirely without restriction as to place, and, except for the title, would apply to cities of the first or second class or any part of the commonwealth. Section 12 makes the first mention of place by requiring each company to maintain an office "in the *city* where such railroad is located." Section 15 has already been quoted, and Section 16 prohibits the construction of any railway "within the limits of any city, borough or township, without the consent of the local authorities thereof," thus reiterating the exact language of Section 9, Article 17, of the Constitution. There is nothing in the nature of the subject to prevent the requirements of Sections 12 and 15 from applying to boroughs and townships equally well as to cities. It seems entirely clear that throughout the act the Legislature had in view its general scope as indicated in the title, and did not deem it necessary either to restrict its localities in the first eleven sections or to expressly enumerate all of them in the twelfth and fifteenth; and that in using the word "city" it was intended to include all the cities, boroughs and townships within the scope of the act, as indi-

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cated by its title. The objection that borough councils are not included in Section 15 is therefore not tenable. This section does not in express terms include corporations formed subsequently to the act, but I should hesitate to say, especially upon motion for preliminary injunction, that the powers of the council did not extend to such cases. But it is not necessary to consider that point now, as it is entirely clear that the authority under this section must be expressly given by ordinance making proper provision for compensation, etc. As this necessary preliminary has not been met, the respondent must for the present be enjoined.

The grant to the complainant not being exclusive, the right of the respondent to lay tracks on Main street can not be questioned. But both rights exist subject to the reasonable direction and control of the council. This would be the case from the inherent power of the council to protect the public interest and convenience, but, in addition to this, the council itself, in its ordinances of consent, has expressly reserved and maintained its jurisdiction over the street. Whether it is practicable to allow the respondent to use the tracks of complainant already laid down on the centre of the street, without unduly interfering with complainant's own use of them, and if so, whether public interests would be best served by such joint use or by separate tracks, are questions of practical convenience upon which the council is entitled to use its own judgment. It may direct the arrangement of tracks so as to inconvenience other travel as little as possible. If council fails to do this, or to grant respondent the right to use complainant's tracks, respondent may select its own location on any part of the street not actually occupied by complainant.

And now, to wit, July 1, 1887, this case having been argued by counsel upon motion to dissolve the injunction, it is ordered and decreed that so much of the injunction heretofore granted as restrains and enjoins respondent from connecting its tracks with the tracks of complainant on the centre of Main street, and from entering upon and running cars over complainant's said tracks, be continued until further order, and that the rest of said injunction be now dissolved.

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THE GIRARD LIFE INSURANCE, ANNUITY AND TRUST CO., TRUSTEES, VS. THEOPHILUS A. ASHBURNER AND ELIZABETH HIS WIFE, IN RIGHT OF SAID WIFE.

Construction of a will—The testator made his will bequeathing and devising to his wife during her life a certain residue of his estate. By a codicil he devised a part of the real estate included in the said residue to his wife absolutely. Afterwards by a second codicil he revoked the devise to his wife for life as contained in the orlginal will, and provided as follows: "I give, devise and bequeath the said rest and residue of my estate to "the Girard Life Insurance, Annuity and Trust Company, of Philadelphia, in trust, to "pay the net income thereof to my said wife during her natural life for her sole and "separate use," etc. *Held*, that the devise in fee to the wife in the first codicil remained unrevoked.

CASE STATE, amicable action of ejectment.

John G. Johnson, Esq., for plaintiff.

George W. Biddle, Esq., for defendant.

The facts sufficiently appear from the opinion of the court delivered June 20, 1887, by BOYER, P. J.

Henry G. Freeman, by his will dated the 11th day of February, 1874, after the bequest of household furniture and various other articles of personal property to his wife Eliza Freeman, and certain legacies to two nieces, and the devise of a certain house and lot to his daughter Elizabeth during life, devised and bequeathed the residue of his estate as follows, viz.: "All the rest and residue of my "estate, real and personal, I do give, devise and bequeath unto my "said wife, to have and to hold, use and enjoy the rents, issues, and "income and profits thereof, for and during the term of her natural "life; and after the death of my said wife I do give, devise and be-"queath the said residue and rest of my estate, real and personal, "and every part and parcel thereof, unto the Girard Life Insurance, "Annuity and Trust Company, of Philadelphia, to have and to hold "the same upon the trusts, uses, and purposes, that is to say," etc. Then follows the enumeration of the trusts and uses for which the estate is to be held by the trustees after the death of his wife.

By a codicil, executed in July of the same year, the testator released and bequeathed unto Alexander Wilson a certain debt of five hundred dollars and the interest due thereupon. Then follow the words: "In addition to the residue of my estate which I have in my "said will given, devised and bequeathed to my wife Eliza Freeman "for the term of her natural life, I give and devise to her my prop-"erty in Lower Merion township, Montgomery county, Pennsylva-

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"nia, bought by me at Orphans' Court sale from the heirs of one "Latch, being part of my residuary estate, to have and to hold to "her, her heirs and assigns forever. And in all other respects I do "hereby confirm and republish my said will."

In the month of January of the following year the testator made a second codicil, containing these words: "Whereas in my said will "I have given, devised and bequeathed unto my wife Eliza Freeman "all the rest and residue of my estate remaining after a certain de- "vise and certain legacies therein given, to have and to hold, use "and enjoy the rents, issues, income and profits thereof for and dur- "ing the term of her natural life, now I do hereby revoke and annul "such devise and bequest, and do in lieu thereof devise and be- "queath as follows: I give, devise and bequeath the said rest and "residue of my estate to the Girard Life Insurance, Annuity and "Trust Company, of Philadelphia, in trust, to pay the net income "thereof to my said wife during her natural life for her sole and sep- "arate use," etc.

The contention of the plaintiffs is that the second codicil gives to the trustees the whole of the residue defined in the original will, and before the execution of the first codicil; and that it revokes the devise given by the first codicil in fee to Mrs. Freeman.

The contention of the defendants is that the testator by the execution of the second codicil intended to and did leave unaffected the devise of the fee in the first codicil to his wife; and that the second codicil simply transmitted the life estate of Mrs. Freeman in the residuary estate remaining after the execution of the first codicil to trustees for her benefit.

Keeping in mind that the intention of the testator is to be sought for as the controlling principle in the construction of wills, there are certain rules of construction recognized as aids in determining such intention, and which are too well established to require the citation of authorities in their support.

It is a clear principle of the English and American cases that all codicils, however numerous, are to be regarded as parts of the same will, and are altogether, with the original will, to be construed as one instrument; also that the effect of a codicil ratifying a will gives the same force to the will as if written, executed, and published at the date of the codicil; and where there are numerous codicils the effect of the later ones is to republish the earlier ones. An-

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other rule of construction is that all parts of the whole will are to stand if they can be reconciled with each other; although if the parts are repugnant the latest prevails. Another rule of construction is that where the will contains a clear and unambiguous disposition of property, real or personal, such gift is not allowed to be revoked by doubtful expressions in a codicil. The revocation must be as clear as the devise.

The main point of inquiry in this case is, What did the testator mean when in his second codicil he used the words "*said rest and residue of my estate*"? Was it the residue as it stood in the original will before the first codicil was made; or was it the residue as it stood after the first codicil was made, and which was then a part of his whole will? By the first codicil the property in dispute had been eliminated from what had been before the residuary estate; and so it stood when the last codicil was about to be made. In the latter he commences by reciting both instruments as composing his will as follows: "I, Henry G. Freeman, of the city of Philadelphia, "do make this my second codicil to my last will and testament "dated February 11, 1874, the first codicil to which bears date of "July 14, 1874." By the second codicil the testator expressly revoked the residuary estate which he had devised and bequeathed to his wife for life; and nothing else; and in lieu thereof substituted the Girard Life Insurance, Annuity and Trust Company, of Philadelphia, as trustees of the same for her benefit; thus relieving her from the care of it, but still giving her the usufruct. As to the devise to her of the Merion property in fee in the first codicil the last codicil is silent. It is obvious there was no express revocation of it.

What is there to support the construction that it was revoked by implication? If we assume that the testator intended to revoke the devise in fee to his wife as contained in the first codicil, by transmitting the whole of the residuary estate as defined by the original will to the trustees mentioned in the second codicil, then the first codicil would have nothing left to it upon which it could operate; for the residuary estate as it stood in the first instrument would have *included* the indebtedness of Alexander Wilson, which, but for the bequest of it to him in the first codicil, would have been a part of the testator's residuary estate; and this legacy to Wilson and the devise to the wife constitute all the gifts which the first codicil contains. But that the testator intended that the first codicil should

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still continue to operate on something, is plain from the words used by the testator in the last paragraph of the second codicil, to wit: "*Subject to the provisions of this second codicil I republish and affirm "my said will and first codicil.*"

It appears, therefore, that the residuary estate devised and bequeathed to the trustees by the second codicil was not intended to be exactly the same as it originally stood when the will was first written; but was subject to the deductions made therefrom by the first codicil; and consisted thereafter of what the first codicil had left of it.

If the testator had intended to revoke the devise to his wife made by the codicil, the most natural course would have been expressly so to declare; but there is nothing in the last codicil which would justify the conclusion that he so intended even by implication. The two codicils are *reconcilable* with each other, and may consistently both stand together.

In our opinion the sole intent and effect of the second codicil was to convert the residuary estate as it stood at the time in the testator's will (of which the first codicil was a constituent part) into a trust for the wife's benefit during life; and that both the devise and legacy that constitute the first codicil remain undisturbed. This we believe to be in accordance with every rule of construction applicable to the case.

It follows, therefore, that the defendant, Elizabeth Ashburner, having lawfully acquired the title to the premises in controversy originally held by Eliza Freeman under the last will and testament of her husband, Henry G. Freeman, is entitled to the possession of the same.

And now, June 20, 1887, judgment is entered upon the case stated in favor of the defendants.

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KRAUSE ET AL. VS. ADAM B. NEIDIG.

Where an assignee for benefit of creditors asks leave to intervene and make defence after judgment is entered upon a *sci. fac. sur* mortgage, a writ of error taken by the assignee is not a *supersedeas* to the *levari facias*.

Rule on Sheriff to stay proceedings on the writ of *levari facias*, upon application of James Stoneback, assignee for the benefit of creditors.

George N. Corson and *J. Wright Apple, Esqs.*, for rule.

M. Evans, Esq, for plaintiff, contra.

The facts fully appear from the opinion of the court delivered June 6, 1887, by SWARTZ, J.

At the time the judgment was entered against the defendant, Adam B. Neidig, upon the *scire facias*, the assignee, Stoneback, was no party to the record, and his application for leave to defend was made after the writ of *levari facias* was issued and placed in the Sheriff's hands. The assignment was made before the *scire facias* issued.

The assignee being no party to the record is not in any way affected by the judgment. The judgment is not against him. We do not see how a writ of error taken by a stranger to the judgment can be a *supersedeas* to that judgment.

The assignee made application to open the judgment, and if he had taken an appeal from the decision of the court and given security for the payment of the debt, interest and costs, the appeal would have operated as a *supersedeas*. Act April 14, 1877, P. L., 53.

And now, June 6, 1887, the rule is discharged.

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Orphans' Court of Chester County.

Estate of Oliver P. Wilson, Deceased.

A held a claim against two persons jointly, from one of whom she received a portion of the debt due her and released him from further payment. *Held*, under the facts, that the creditor was entitled to a dividend from the estate of the other debtor on the whole amount of the claim, to an extent not exceeding the balance due her, and not exceeding the ratable share of the debt which the deceased debtor was under obligation to pay.

Rachel J. Wilson had a claim against John D. Wilson and Oliver P. Wilson for $500. John D. Wilson made an assignment for benefit of creditors, and Oliver P. Wilson died insolvent. Afterwards the creditor received from John D. Wilson $400 on account of the claim, and released him from further payment. In the distribution of the estate of Oliver P. Wilson she claimed a dividend on the whole debt of $500 and its interest. The auditor allowed her a dividend only on the unpaid balance. To the refusal of the auditor to allow her a dividend on the whole claim, exceptions were filed.

William M. Hayes, Esq., for exceptant.

R. E. Monaghan, Esq., contra.

The opinion of the court was delivered by Futhey, P. J.

We agree with the auditor that Rachel J. Wilson did not release her right to resort to the estate of Oliver P. Wilson for payment of the balance due her by the acceptance of a part of her claim from John D. Wilson and releasing him from further payment. We think, however, that he erred in not awarding to her a dividend on the whole amount of her claim.

At the death of Oliver P. Wilson she was entitled to claim payment both from the estate of Oliver P. Wilson and John D. Wilson. Had the estate of Oliver P. Wilson then been distributed, she would have been entitled therefrom to a dividend on the whole amount of her claim. She became, by his death, entitled to a proportionate share of the assets of his estate. The fact that before the estate of Oliver P. Wilson was ready for distribution, John D. Wilson paid a part of the claim, does not take away her right to receive a dividend on the whole amount from the estate of Oliver P. Wilson. She is entitled to receive her share of his estate which devolved upon her by his death, to an amount not greater than the balance payable to her. This principle is well settled by the authorities: Keim's Appeal, 3 Casey, 42; Miller's Appeal, 11 Id., 481; Patten's Appeal, 9 Wright, 151; Hess' Estate, 19 P. F. S., 276;

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Smith's Appeal, 24 Id., 191; Graeff's Appeal, 29 Id., 146; Miller's Estate, 1 Norris, 113; Watt's Appeal, 3 Id., 101.

The act of 22d March, 1862 (Purdon, 1299, 11th Edition), would, in consequence of her release of John D. Wilson, undoubtedly prevent her from receiving from the estate of Oliver P. Wilson more than his ratable proportionate share of the indebtedness, but it would not, beyond that, affect the principle above stated as to the manner to which her share of his estate should be ascertained. It is manifest, however, that the amount which she will receive from the estate of Oliver P. Wilson will be much less than its ratable share, and therefore her rights are not affected by the act.

The report is referred back to the auditor for correction on the principles here indicated.

Court of Common Pleas of Luzerne County.

KOHL & CO. VS. BOLAND ET UX.

A married woman who has applied for and received the benefits of the act of 1872 (separate earnings) is not liable on *every* contract made after the decree, but only on such as are made in the prosecution of her separate business, and this fact should be alleged in the declaration in order to entitle a plaintiff to take judgment against her for want of an affidavit of defence. Bovard vs. Kettering, 5 Out., 181, recognized and distinguished.

RULE to strike off judgment as to Bridget Boland.

The opinion of the court was delivered June 13, 1887, by RICE, P. J.

Bridget Boland is a married woman, and the wife of John Boland, the other defendant. On May 19, 1886, she filed her petition in due form asking to have the benefits of the act of April 3, 1872, P. L. 35, securing to married women their separate earnings, and thereupon the court made the usual order. The copies annexed to the declaration in the present case show that the plaintiffs' claim is founded on a promissory note signed by her, and on a book account for goods sold and delivered to her. But the declaration, which consists of the common counts only, alleges a joint indebtedness of the husband and wife, and contains none of the allegations which are essential to maintain an action against a married woman under the act of 1848. The only reference to the fact that she is entitled to

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the benefits of the act of 1872 is contained in the caption of the suit as above set forth. Was the judgment for want of an affidavit of defence authorized? The plaintiffs' counsel asks us to sustain it upon the authority of Bovard vs. Kettering, 5 Out., 181. The point decided in that case is concisely stated in the syllabus, as follows: "A married woman who has applied for and received the benefits of the act of April 3, 1872, and has subsequently engaged in business under its sanction, does not thereby become a femme sole trader; but is liable, nevertheless, upon her contracts made in the prosecution of such business, as if she were a femme sole, and may be sued thereon without joining her husband."

Judgment was entered in that case after a trial in which all the facts essential to bring the case within the principle above stated had been fully proved. Indeed, they were uncontradicted. In the present case judgment was entered against the femme covert without allegation, proof or presumption that the debt was contracted by her in the prosecution of her separate business. If this judgment is allowed to stand it will establish the principle that a femme covert who has applied for and received the benefits of the act of 1872 is prima facie liable on any contract she may see fit to make, and that in order to escape such liability the burden is on her to prove that it was not contracted in the prosecution of her separate business. We do not understand that any cases go so far as that. Notwithstanding the act of 1872, the liability of a married woman on her contracts, even though she has accepted the benefits of the act, is still exceptional. If on the trial of this case the plaintiffs are able to prove that it comes within the exception recognized in Bovard vs. Kettering, *supra*, and Zurn vs. Noedel, 3 Am. 336, 4 Cent. Rep. 653, we do not say that they will not be entitled to recover. But clearly she is not liable on every contract made since the decree, and her liability being only in exceptional cases we are satisfied that the plaintiffs could not legally take judgment against her for want of an affidavit of defence, without alleging in their declaration the facts necessary to bring the case within the exception. For aught that appears on record the note in suit may have been given for a debt contracted before the decree, and the book account may be for goods for which in law her husband would be solely liable. As the case stands we think the judgment unauthorized and void.

Therefore the rule is made absolute.

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Court of Common Pleas of Montgomery County.

IN EQUITY.

WILLIAM BOOTH vs. WILLIAM F. RUSSELL ET AL.

Bill in equity by a private citizen praying for a preliminary injunction to restrain the storing of powder and other explosives in a magazine constructed twelve years before, and used during that time for that purpose without complaint. *Held*, that it not appearing that there had been any increase of risk to the plaintiff or change in the surroundings, it was not a case for a preliminary injunction, as if the nuisance complained of were a threatened new erection.

RULE for a preliminary injunction.

G. R. Fox & Son, Esqs, for rule.

Charles Hunsicker and *H. B. Dickinson, Esqs.*, contra.

The facts of the case fully appear from the opinion of the court delivered August 1, 1887, by BOYER, P. J.

We have carefully examined the affidavits filed on both sides in this case, without being able to reach the conclusion that a preliminary injunction should be issued at this time. The magazine complained of has existed during about twelve years without any measures having been taken either to prevent its original erection or to restrain its uses, until now. No material change has taken place in the vicinity in the meantime, and the danger complained of seems in no respect to have been lately increased. The storage of dynamite, or explosives other than gunpowder, is denied. This is a complaint on the part of an individual citizen whose improved property, by its distance from the magazine, and the conformation of the intermediate ground, might likely be in no great danger even if an explosion were to happen. At least it is in no greater danger from such an accident than it has been for twelve years last past. In cases of this kind a material distinction is recognized by courts of equity between a long continued establishment and a threatened new erection. We do not wish to be understood as intimating that the long continuance of a dangerous nuisance justifies its perpetuation; but a court of equity should be less disposed to act without due deliberation in the exercise of its mandatory power against an

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old establishment, than if its summary action were invoked to prevent a threatened new erection.

We do not prejudge this case in its future development, nor hold at present that the plaintiff may not upon a fuller hearing establish such a case as to entitle him to a perpetual injunction. All that we decide now, is that, under the circumstances before us, as the case now stands, we decline to award a preliminary injunction.

And now, August 1, 1887, the rule for a preliminary injunction is dismissed.

KRAUSE ET AL. VS. ADAM B. NEIDIG.

Misdescription of the premises in the Sheriff's advertisements, failure to mention a valuable water power, together with some testimony showing inadequacy of price, sufficient ground to set aside Sheriff's sale.

EXCEPTIONS to Sheriff's sale. Rule to set aside.

George N. Corson, Esq., for rule.

M. Evans, Esq., contra.

The facts fully appear from the opinion of the court delivered August 1, 1887, by SWARTZ, J.

The evidence taken in support of the exceptions convinces us that this sale ought not to stand.

The advertisements describe the premises as containing but forty acres, when in fact the farm contains forty-nine acres. This mistake was corrected in the later publications, but the Sheriff failed to make proper advertisement for three weeks, as required by law. The contents of each tract were correctly given; the error applied only to the statement giving the aggregate quantity of land in the four tracts. The reader, however, is not supposed to verify the Sheriff's additions; we must assume that he accepted the Sheriff's statement as correct. Parties desiring to buy may have been misled by the advertisements, which give the farm only four-fifths of its true contents. This error may have deterred buyers from attending the sale.

The Sheriff should have mentioned in the advertisements and hand-bills the water power on the premises. This power had a capacity to run two mills, and a witness says that it is worth at this

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time, notwithstanding the broken dam, from $500 to $1000. The advertisement of the water power is an invitation to a class of bidders which was not addressed by the Sheriff in his sale. These errors and defects in the advertisement, coupled with the testimony showing some inadequacy of price, are good reasons for setting aside the sale.

And now, August 1, 1887, the exceptions are sustained and the sale is set aside.

Court of Common Pleas of Lackawanna County.

MILLER VS. RHODES.

An attachment stops interest on money in the hands of the garnishee from the time the money is due the defendant, if the garnishee is ready and willing to pay it; and this, notwithstanding the fact that the money in his hands is in the bank drawing interest, or that he has paid debts presumably from the profits arising from the use of the money.

RULE to open judgment except as to $1200.

Judgment had been entered against Rhodes in favor of Miller. Soon after Rhodes was summoned as garnishee in the suit of Laughlin vs. Miller, in which suit, after protracted litigation, judgment was recovered for an amount less than the balance owing to Miller by Rhodes.

The amount of this judgment Rhodes as garnishee paid over to Laughlin, and then tendered to Miller the balance ($1200) of the Miller vs. Rhodes judgment without any interest from the time of the attachment. This Miller refused, claiming interest on this balance for that time, holding that he was the more entitled to it as the money in Rhodes's hands had been in the bank drawing interest all that time.

Rhodes then took the above rule.

W. H. Gearhart, Esq., for plaintiff.

A. D. Dean, Esq., for defendant.

The opinion of the court was delivered March 28, 1887, by HAND, P. J.

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Miller vs. Rhodes.

The legal questions which arise in this case are too well settled to admit of controversy. An attachment stops interest on the money in the hands of the garnishee from the time the money is due to the defendant, if the garnishee is ready and willing to pay it. There is no doubt under this evidence the plaintiff would have received his money when due except for the attachment. That writ was the law stepping in and commanding the defendant in this case not to pay. The cases of Mackey vs. Hodgson, 9 Barr, 468; Sickman vs. Lapsley, 13 S. and R., 226; Irwin vs. P. & C. R. R. Co., 7 Wr., 490, have never been qualified or overruled as regards the question of interest. The cases cited by the learned counsel for plaintiff are not in point. They arise under different circumstances. In this case the garnishee is no party to the litigation. He kept himself in readiness, and testifies that he always could pay the plaintiff. The attempt to charge him with interest, because some of his money was in a bank and drawing interest, can not avail. It is not the case of invested money attached; it is money deposited as business men deposit it—for safe keeping. Such an inquiry would involve a collateral issue to determine the showing of a garnishee what he had on interest and what not. The attempt is made in this case to distinguish it from the ordinary case of money attached and ready to be paid over, but the facts do not warrant it. The garnishee may not profit by litigiousness, nor delay, nor by fraud or collusion; neither should the plaintiff profit by the garnishee's skill, nor carefulness, nor risk and labor. It is too technical and forcible a construction of the authorities cited to base a claim of interest on a bank balance or the amount of debts the garnishee has paid while the attachment is pending, and thereby assume that he has made a profit of six per cent. out of this identical money. Such a line of argument would make the courts a clearing-house for a garnishee's business. An examination of the facts and authorities sustains the calculation of the defendant's counsel, which we find to be arithmetically correct.

The rule in this case is made absolute, the calculation showing that the plaintiff is overpaid to the amount of $28.59.

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Court of Common Pleas of Montgomery County.

JAMES WARD vs. JOHN WARD.

In a rule to open judgment, where the defendant swears that the signature is forged, and the plaintiff swears that he saw defendant sign the same, and is corroborated by other circumstances, there is not sufficient ground to open the judgment.

The court must weigh the evidence and decide according to the preponderance thereof.

RULE to open judgment.

Henry A. Stevens, Esq., for rule.

James B. Holland, Esq., contra.

The facts of the case are fully disclosed by the opinion of the court delivered August 1, 1887, by SWARTZ, J.

The application in this case alleges that the judgment note in question was given as collateral to secure the payment of the balance due James Ward, to be ascertained upon a settlement of accounts. A rule to show cause was awarded, and it now appears from the testimony taken that the defendant makes further defence by alleging that the note is a forgery.

We find that the evidence establishes that John Ward owes his brother James Ward the full sum of $2500. There are but a few disputed items in the account. John admits that he never paid any money for the Conshohocken house, and that his brother bought it for him out of his wages. In the account James gives credit for the full wages for the entire time of service, and takes a reconveyance of the house; therefore John can not be allowed an additional credit for the value of the house. Under the testimony we find there is nothing due John for work done on the monument. John was in James' employ when this work was done, and received monthly wages. He is not entitled to double pay. The credit claimed on the ice business is also unsustained. That James aided his brother in numerous ways, and made every effort to give him a successful start in business, can not be denied. John in his testimony seems to recognize the fair treatment always accorded him by his brother

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The second branch of the case is surrounded with more difficulty. Ordinarily, when a defendant positively denies his signature, a jury is called in to aid in the determination of the issue. We can see no good reason, however, for such a disposition of this case. Where the defendant denies the execution of the judgment note, the burden is still upon him to make out this defence. Roenigk's Appeal, 2 Central R., 68.

The defendant fails to offer a single fact or circumstance to sustain his allegation of forgery. We have his declaration under oath that he never signed this note, and yet upon the 12th day of May, when he made his application to open this judgment, he swears just as positively that upon the first day of April, 1887, he gave his brother the note of $2500, upon which execution was issued. He now swears that he signed no note or paper of any kind on the first day of April or any subsequent day, except upon the day the Sheriff made a levy upon his property. It is very apparent from the testimony that the defendant prior to and at the time the application was made, and from that day on, was so much given to drink that his declarations are not reliable.

We have compared the alleged forgery with the genuine signatures of the defendant offered and admitted in evidence, and find nothing to sustain the defendant's allegations of forgery; nor does he attempt to show where the forged signature in any way differs from the genuine. The defendant, according to his own testimony, was very anxious to obtain possession of the Cedar Grove hotel; he depended on his brother to buy it for him, and had full confidence in his brother. James says his brother was willing to sign anything to secure the hotel, and we fail to see any reason, motive or necessity for the alleged forgery. The $2500 was due at the time the plaintiff claims the note was executed. John kept no accounts, but relied upon his brother's books.

John testifies that upon the day the Sheriff made his levy he had such confidence in his brother's honesty that he signed a paper at his request without reading it or knowing its contents, and that at the time he was sober. To sustain the allegations of the defendant in this case we must find that the plaintiff, who had a valid claim for $2500 against his brother, forged the signature when he could have had a genuine note by simply asking for it.

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Under the evidence before us the court would not sustain a verdict of a jury against the note. This is a safe test, and under it it is the duty of the court to dismiss the rule. Association vs. Rood, 12 Luz. L. R., 9.

We cite as authority for our disposition of the case Zaring vs. Earley, 2 Pearson, 352, and Earley's Appeal, 90 P. S. R., 321, where it was held that a judgment will not be opened where the testimony of the defendant and the plaintiff counterbalance.

A judgment will not be opened upon the unsupported affidavit of the defendant contradicted by the plaintiff on oath. Kocher vs. Rice, 2 Luz. L. R., 24. In Wernet's Appeal, 91 P. S. R., 322, the court say: "We have several times decided lately that on an appli- "cation to open a judgment it is proper for the court to weigh the "evidence and to decide according to the preponderance thereof."

In Earley's Appeal, *supra*, it was held that judgments were not to be thrown open in all cases on the oath of a party alone against the oath of the other party. In such a case the writing must prevail and the judgment remain undisturbed. One of the latest cases, Roenigk's Appeal, 2 Central Rep., 68, holds that the unsupported testimony of the defendant alleging forgery, denied by the plaintiff, is insufficient to open the judgment.

And now, August 1, 1887, the rule to open judgment is discharged.

Court of Quarter Sessions of Dauphin County.

LARK'S PETITION.

The Court of Quarter Sessions has no authority, upon the petition of a single land-owner, to exclude his lands from a borough, after the borough has been duly incorporated.

PETITION of H. L. Lark to have certain land excluded from the borough of Berrysburg.

H. L. Lark, Esq., for petition.

The facts fully appear from the opinion of the court delivered by MCPHERSON, J.

We are unable to find any statute giving us authority to consider this application. The last sentence of Section 3 of the act of

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1834, P. L. 163, was referred to by the petitioner, but that provision must be read in connection with Section 2, and can only apply to cases where a majority of the freeholders in a borough desire a change of boundaries. The act of 1863, P. L. 200, was also relied upon, but it seems clear to us that proceedings under that act can only be taken when a borough is about to be incorporated. If the owner of land, exclusively used for farming, finds his property included within the limits of a proposed borough, it is his duty to then object, and make proof of such facts as will enable the court to act for his protection. If he acquiesces in the designated boundaries, he has only himself to blame if he afterwards finds his situation burdensome. In this case, more than twelve years elapsed between the incorporation of Berrysburg and the filing of this petition, and nearly five years since the property in question was purchased by the petitioner.

Moreover, it is reasonable to assume that the position of such property will be considered by an intending purchaser, and that its liability to borough taxes, with the disadvantages incident to its situation near the borough line, will always affect the market price. In that case there would be little hardship, and the court would feel less regret at its want of power to entertain the application. The purposes of justice seem to be fully met by confining individual applications for relief to the time of incorporation. Those who then own land within the proposed limits must protect themselves by objection, or suffer the consequences of their acquiescence or neglect; those who afterwards buy the land can protect themselves effectively in the price they pay.

Petition dismissed.

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Court of Common Pleas of Montgomery County.

MARY TYSON vs. DAVID KRATZ.

Testator directed the portion of his estate "remaining in the hands of the executors" due to a daughter to be held in trust for her, and pay to her the income only. Subsequently he directed that one-third the purchase money of his real estate as dower, and after the death of widow to be payable "to my five children share and share alike." *Held*, upon the death of widow the share of dower payable to said daughter is payable to her absolutely.

CASE STATED.

Louis M. Childs, Esq., for plaintiff.

The facts of the case fully appear from the opinion of the court delivered June 20, 1887, by BOYER, P. J.

The question submitted to the court for decision in this case is whether the defendant, David Kratz, is entitled to retain in his hands as trustee under the will of Jacob Kratz, dec'd, a certain sum of two hundred and forty dollars, the share of Mary Tyson, a daughter of said decedent and plaintiff in this action, out of a twelve hundred-dollar dower fund for the use of the widow of said testator during her life, and who is now deceased. This dower fund arose out of the sale of real estate by the executors as directed by the will, and is subject to the following testamentary direction: "Item. I order "and direct that if my real estate is sold that one-third of the pur- "chase money shall remain therein as a dower fund for my wife "Mary, and the interest thereof at five per cent. to be paid to her "each and every year during her life-time, and immediately after "her decease the principal sum to my five children as above named "share and share alike; those not living to their legal heirs."

If this clause of the will stood alone nothing could be clearer than that upon the decease of the widow the principal of the dower fund would be payable directly to the five children named, of whom Mary Tyson was one, or to their legal representatives. The only doubt arises from a preceding clause of the will by which David Kratz is appointed trustee for the testator's daughter, Mary; but it will be observed that this trust is confined to the moneys *remaining in the hands of the executors.* But by the express direction of the will afterwards the principal of the dower fund charged upon the real estate sold by the executors, was, after the death of the widow, to be paid proportionately to the testator's five children, and not payable into the hands of the executors. Whatever, therefore, may

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be the control of David Kratz as trustee over the share of Mary in other portions of the estate, her share in the dower fund in question is payable directly to her.

The reservation for the payment of the proportion of purchase money which constituted the dower fund was in the deed to the purchaser written in conformity to the bequest in the will, and made payable directly to the beneficiaries therein named.

The court being of opinion that the said Mary Tyson is entitled under said will, and reservation in said deed, to the absolute ownership of the one-fifth of the principal of said dower fund mentioned in said deed, now, June 20, 1887, judgment is entered upon the case stated in favor of the plaintiffs for the sum of two hundred and forty dollars.

Court of Common Pleas of Chester County.

LYDIA CALDWELL VS. CHARLES DIXEY ET AL.

A party in attendance as a suitor before a justice of the peace is privileged from arrest on capias.

RULE to set aside the service as to Dixey.

The writ was issued November 15, 1886; the same day it was served and returned by the Sheriff. On the following day defendant asked to have the service of the writ set aside.

D. S. Talbot, Esq., for rule.

C. W. Talbot, Esq., contra.

The opinion of the court discloses all the facts, delivered April 25, 1887, by FUTHEY, P. J.

This suit is by Lydia Caldwell against Charles Dixey and seven other defendants for trespass, and was commenced by capias. Charles Dixey, it is satisfactorily shown, is a resident of Philadelphia. On November 15, 1886, he was in attendance before a justice of the peace in West Chester on the trial of the case of Hoopes vs. Dixey, he being the defendant, and for which purpose he had come to West Chester. At the trial, and while he was in the act of testifying, the Sheriff entered the room and served the writ in this case upon him. The defendant Dixey asks that the service be set aside.

It is settled that suitors and witnesses while on their way to and from court, and while in attendance thereon, are privileged from the

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service of a summons and from arrest on capias in civil cases: 1 Troubat & Haly's Practice, Sections 236 to 240. We had occasion to examine this question in Rupert vs. Creswell, 1 Chester Co. Rep., 443, and referred then to the authorities on the subject.

It is argued, however, that, as there was no contempt of this court, from which the process issued, the suitor not being in attendance on this court, we should not interfere with the service of the writ.

It was, however, an abuse of the process of the court to serve it upon the defendant while he was in attendance as a suitor in another court, even though it was that of a justice of the peace. There is no reason for any distinction in this regard between a court of record and that of a justice, where the attendance is before him sitting in his judicial capacity. The court will not lend its aid to parties who thus seek to effect a service of its process. It is an interference with the privileges of the suitor and against the policy of the law.

The cases are numerous where the court which issued process has set aside the service where it was made upon a defendant who had come within the jurisdiction of the court issuing the writ to attend another court as a juror, party, or witness, or to attend before examiners, arbitrators, referees appointed by a justice, etc. We need only refer to Holmes vs. Nelson, 1 Phila., 217; Huddeson vs. Prizer, 9 Id., 65; Steinmetz vs. Wade, 3 W. N. C., 187; Ruger vs. Keller, 12 Id., 371; Young vs. Armstrong, 13 Id., 313; Wilson vs. Byrd, 14 Id., 438; Webb vs. Carter, 9 Lancaster Bar, 65; 1 T. & H. Pr., Section 240, notes.

The party thus entitled to exemption from the service of a summons or arrest on capias must, however, promptly assert his privilege, so that the plaintiff may have notice, and, if he chooses, be vigilant for a more effectual service. If he does not do so, and delays his application for an unreasonable time, or until he has taken steps recognizing the validity of the service, he will be deemed to have waived his privilege. The court is not bound judicially to notice a right of privilege, nor to grant it without a claim therefor: Gyer vs. Irwin, 4 Dallas, 107; Massey vs. Dantum, 12 W. N. C., 436; Green vs. Bonaffon, 2 Miles, 219. The exemption in the case before us was made soon after the writ was served, and with sufficient promptness.

The rule is made absolute, and the service of the writ set aside as to Dixey, and he is discharged from responsibility upon his bail bond.

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Court of Common Pleas of Northampton County.

BOROUGH OF SOUTH BETHLEHEM VS. CONNOLLY.

Costs, being an incident of a judgment for a debt, become an incident of a judgment for a penalty made recoverable as a debt.

A justice will be presumed, on certiorari, to have done his duty concerning a cause tried before him.

CERTIORARI.

James Mahon, Esq., for exception.

F. Davis Brodhead, Esq., contra.

The facts fully appear from the opinion of the court delivered by SCHUYLER, P. J.

The record brought up by this writ discloses a suit before a justice of the peace for a penalty of twenty dollars for the violation of a borough ordinance. The ordinance provides that penalties for its violation shall be recovered as debts of like amount are by law recoverable. The record also discloses that a summons requiring the defendant to answer the plaintiff in a "plea of debt" was duly issued and served, that both parties appeared, that a trial was had, and that judgment was entered publicly against the defendant for the amount of the penalty with costs. This is all that is necessary in an ordinary action of debt, and all that is necessary here. Costs, being an incident of a judgment for debt, become an incident of a judgment for a penalty made recoverable as a debt. The ordinance is a reasonable and proper one, and clearly within the expressly delegated powers of the plaintiff. We do not feel called upon to inquire whether a previous demand was necessary. If it was, we are bound to presume that the justice did his duty and that he required proof of the demand before entering judgment. Gibbons vs. Wandell, 2 Kulp, 344, is too imperfectly reported to be an authority to the contrary. What has been said disposes of all of the exceptions that seem to require notice.

July 4, 1887. Exceptions dismissed and judgment affirmed.

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Supreme Court of Pennsylvania.

Appeal of Aaron Sperry et al.

R., a member of an Odd Fellows' lodge, after paying dues for thirty-five years, applied in 1881 for two weeks' sick benefits. Upon the charge of another member that R. was feigning sickness, the lodge refused the benefits, appointed a committee of investigation, and upon R.'s failure to appear expelled him for contempt. On appeal to a higher tribunal of the order R. was granted a new trial before a committee. The committee rejected the testimony of R.'s physician because he did not attend R. until after the offence with which R. was charged. The decision of the committee, affirmed by the highest forum of the order, found R. guilty, and he was suspended for two years by a two-thirds vote. R. filed a bill in equity for reinstatement and an account. *Held*, that all irregularities in the appointment of the committee were cured by R.'s appearance; and that, although the physician's testimony might have been relevant for some purposes, yet its rejection was a mere mistake in judgment, and no complaint was made in regard to it when the committee reported to the lodge; and besides, R. was convicted by a tribunal of his own choice; and nothing but the regularity of the proceedings could be inquired into by this court.

Justices Green and Trunkey dissent.

Appeal from a decree of the Common Pleas of Montgomery county in favor of plaintiff in a bill in equity.

This was a bill in equity filed by I. D. Rosenberger against Aaron Sperry and others, members of Springhouse Lodge, No. 329, I. O. O. F. of Pennsylvania, to compel them to admit the plaintiff into full fellowship in the association and to all his rights therein, to account to him for the amount due by the association to him, and to pay over to him the amount so ascertained.

J. P. Hale Jenkins, Charles Hunsicker and *Amos Briggs, Esqs*, for appellants.

N. H. Larzelere and *M. M. Gibson, Esqs.*, for appellee.

The opinion of the Supreme Court was delivered May 16, 1887, by Gordon, J.

We are inclined to think that this case was not properly disposed of in the court below. The learned master, properly apprehending that he must, under the authorities, confine himself to those questions which involved some infraction of the organic law of the society to which the plaintiff belonged (in other words, to some material irregularity in the proceedings which resulted in the complainant's suspension), found two such infractions or irregularities.

The first of these is that in the appointment of the trial committee there was not a strict compliance with the by-laws; but as

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this irregularity was, as he seems to admit, cured by Rosenberger's appearance before the committee without objection, we can not understand in what manner it was made to affect the case. The second, that certain testimony, offered on part of the complainant, was ruled out.

We give the whole matter in the language of the master, thus: "The only allegation against the regularity of the proceedings before the trial committee was the refusal to hear the testimony of Dr. B. K. Johnson. The official report of the trial committee shows the following facts, viz.: 'B. K. Johnson obligated—I am a physician in North Wales, and a graduate in Pennsylvania in 1861. I know Brother I. D. Rosenberger, and have attended him. I first saw him professionally in August, 1881. P. W. G. M. Borie objects to the testimony of Dr. Johnson because the offence charged against the defendant is alleged to have occurred prior to Dr. Johnson's professional connection with him. The question being put before the committee, the objection is sustained. Brother Gerhart, for the defence, objects to the ruling of the committee."

It will be observed that what is here alleged is that the committee made a mistake in ruling out relevant testimony as irrelevant. Admitting that this evidence might have been relevant for some purpose, and ought, therefore, to have been admitted, nevertheless it does not appear that it was anything more than a mistake in the judgment of the committee; nor does it appear that any complaint was made of this ruling on the subsequent trial in the lodge, of which trial we have the following report by the master: "April 15, 1882, Rosenberger was present in the lodge meeting, and the report of the committee was considered. The findings of the committee were then made the final judgment of the lodge. A motion to expel was lost, but a motion to suspend Rosenberger for two years was carried by the necessary two-thirds."

Here, if we are to believe the master, was an appearance; a regular adjudication, and no complaint made of the action of the committee; a clear waiver of the defect complained of. It is said, however, that the evidence taken by the committee was not read. This assertion does not accord with the finding; but no matter. He could have required its reading had he so desired, and if he chose to waive it that was his own business. But with these matters we have nothing to do, for, as was said by Mr. Chief Justice Gibson, in

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the case of the Black and White Smiths Society vs. Vandyke, 2Whar., 309: "Into the regularity of these proceedings it is not permitted us to look. The sentence of the society, acting in a judicial capacity and with undoubted jurisdiction of the subject matter, is not to be questioned collaterally. If the plaintiff has been expelled irregularly, he has a remedy by mandamus to restore him; but neither by mandamus nor by action can the merits of his expulsion be re-examined. He stands convicted by the sentence of a tribunal of his own choice, which, like an award of arbitrators, concludes him."

So, in the case of the Commonwealth, Fischer, vs. German Society, 15 Pa., 251, held per Rogers, Justice, citing from 8 W. and S., 251: "The courts entertain a jurisdiction to preserve these tribunals in the line of order, and to correct abuses; but they do not inquire into the merits of what has passed *in rem judicatam* in a regular course of proceedings."

It thus seems to be settled that neither the mistake made by the trial committee nor by the lodge can be noticed or reviewed by the courts. "He stands convicted by the sentence of a tribunal of his own choice, which, like an award of arbitrators, concludes him."

The mistake made in the court below was in treating the case as an appeal, whereas it was a collateral action—like a suit brought on a claim which had been finally disposed of by an arbitration at common law.

The decree of the court below is now reversed and set aside, and the bill dismissed at the costs of the appellee.

GREEN, J., delivered the following dissenting opinion, in which TRUNKEY, J., concurred:

In the case of Commonwealth, Bryan, vs. Pike Beneficial Society, 8 W. and S., 247, we said: "The courts entertain a jurisdiction to preserve these tribunals in the line of order, and to correct abuses; but they do not inquire into the merits of what has passed *in rem judicatam* in a regular course of proceedings."

In Commonwealth, Fischer, vs. German Society, 15 Pa., 251, we held that in case of the disfranchisement of a corporator the courts entertain jurisdiction to restore him by mandamus where the cause is insufficient or the proceedings irregular. The return to a

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mandamus to restore a corporator must distinctly set forth all the facts of amotion, that the court may judge of its sufficiency both as to the cause and the form of the proceedings. It is irregular to expel a member without giving him an opportunity of being heard in his defence before the society at large.

In Society for Visitation, etc., vs. Commonwealth, Meyer, 52 Pa., 125, we sustained a demurrer to the return to a mandamus, on the ground that it did not set forth distinctly and certainly all the facts essential to the conviction of the offence charged, both as to the cause and mode of proceeding. Agnew, J., in the opinion, assuming that the courts have jurisdiction to inquire into the regularity of the proceedings of the society which resulted in the amotion of the relator, held the return insufficient because it did not specifically set forth that the relator was found guilty on sufficient evidence. The return did say that the relator was expelled "according to the terms of the constitution and by-laws"; and also that "the said relator was then and there, and according to the said constitution and by-laws, tried, and by the unanimous vote of the members present, each one answering separately, pronounced and convicted as guilty of said charges." But this was held to be insufficient. Judge Agnew proceeded to say: "If a corporation can shelter itself behind a return which constitutes itself the judge of the regularity of its own proceedings, there is no safety for its members. If it choose to return that a member was tried in due course of law, the facts which constitute the course of procedure are simply inferred because the law requires a certain course, not that these facts are actually averred." He also said that another ground of demurrer might have been assigned because the return did not aver that the charge made by the board was in writing and signed by them.

In view of the foregoing and other authorities which might be cited, it is no longer to be questioned in this commonwealth that in proceedings against corporators within the corporation, whether for suspension or expulsion, the procedure itself must be in conformity with the organic law of the corporation, the cause must be sufficient, the trial and proceedings must be regular, and the proof must be at least adequate in the judgment of the corporation; and, in case of a contest in the civil courts, that fact must affirmatively appear in the answer or return of the corporation.

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The power of the courts to give relief where the corporation has violated or disregarded its duties in these respects has been repeatedly asserted and exercised. It is of course the duty of the member to exhaust the remedies afforded by the constitution and by-laws of his order or association before resorting to the courts. All of this was done by the plaintiff in this case. He did not file his bill until the tribunal of last resort within his order had decided finally against him.

The master and the court below have decided in his favor both upon the facts and law. In order to intelligently decide the question before us it is necessary to recur somewhat to the facts of the case, which are in some respects of an extraordinary character. The master has found upon entirely undisputed testimony that the plaintiff became a member of Springhouse Lodge, defendant, in 1849, and was a member in good standing until 1881; and that from the time of his initiation up to the time of the master's report, July, 1885, "he has paid all his dues and assessments as they fell due."

He further finds that in May, 1881, the plaintiff demanded two weeks' benefits by letter, and thereupon in July, 1881, a member preferred charges against him, the substance of which was that he had feigned a sickness which he did not have. A committee appointed to try him upon these charges quickly condemned and the lodge expelled him, but the Grand Lodge on appeal reversed this action and directed a trial on the original charge. At the trial before the new committee the plaintiff offered to prove that the charge preferred against him was false, by the physician who treated him, when upon the trivial objection that the physician had not attended him at the time of his original allegation of sickness, some three or four months previously, his offer of testimony was rejected. The reason given for rejecting this offer was that it was irrelevant. Of course the evidence offered was not irrelevant, and no court would have entertained the objection for an instant.

The question which now arises is, Was the refusal to hear this testimony an irregularity in the proceedings such as to vitiate the subsequent action of the defendant suspending the plaintiff for two years? That depends upon a consideration of the rights of the plaintiff as a member of the order, as those rights are prescribed in the constitution and by-laws, and of the character of the testimony offered in connection with the charge upon which he was being tried.

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So far as his rights are concerned as a member on trial, they are sufficiently defined by the third section of Article VIII of the constitution, which provides as follows: "It shall be the duty of the committee to examine the parties, their proofs and witnesses, giving the member charged notice and full opportunity to be present at the examination."

There can be no question under this language that a member against whom a charge is made has a right to disprove the charge. If he has not, this constitutional guaranty is nothing but a snare and a delusion. The language is peremptory, explicit, and without the slightest ambiguity. It confers in the clearest and most positive manner upon an accused member the right to be heard by himself, his proofs, and his witnesses. There is no discretion reserved to the trial committee to reject either proofs or witnesses. They are absolutely bound by the organic law to receive and hear them. In the opinion of the writer it is not possible to conceive of a more gross or violent deprivation of a sacredly guaranteed right than to refuse to a member the hearing of testimony to disprove an accusation on which he is upon trial. It is almost unnecessary to say that no court could live which would indulge in such practices in the administration of either criminal or civil justice. It is wasted effort to discuss so plain a question. To say of any tribunal, clothed with the power to hear and determine accusations against individuals, that it is not an irregularity in its proceedings to deny to the accused the right to prove his innocence by testimony is to utter an entirely untenable proposition incapable of defence.

But is said in the present case that the rejection of the proffered testimony was only a mistake of judgment, and therefore the accused is without remedy and must submit to the consequences because his order refuses to correct the mistake. To this conclusion the writer can not possibly assent.

First. Because it fails to distinguish between mistakes which in the true sense of the word "mistake" are trivial and unimportant errors of judgment and those which are vital, fundamental, reaching to the very heart of the proceeding, or the controversy.

Second. Because the argument necessarily concedes the error of the action of the committee in rejecting the testimony, but condones all its effect by calling it a "mistake," without considering the whole bearing of the effect. Certainly if the whole testimony offered

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in defence by the accused in this or any similar proceeding had been arbitrarily rejected, for the very purpose of depriving him of the right to be heard at all, such action could not, and would not, be defended, when charged as an irregularity, upon the ground that it was a mistake. The injury to the accused would be just as grave, serious and fatal, whether the cause of it is called a mistake or an irregularity. In other words, whether the error in question is to be treated as a mere mistake in judgment or a fatal irregularity in the proceedings depends upon the real character and effect of the error and not upon the name that may be given to it. If it accomplishes the deprivation of a grave constitutional right which is inherent in the proceedings of all tribunals it is necessarily an irregularity of the most serious character. When the character of the action taken in this case is compared with the causes for setting aside the action of the society in the case of Society for Visitation, etc., vs. Commonwealth, Meyer, 52 Pa., 125, the latter dwindle into insignificance.

Third. I am not at all able to take the exceedingly lenient view of the action of the trial committee, which treats it as a mere mistake of judgment in the decision of a question of evidence. A careful reading and consideration of the master's report and of the facts found by him has impressed me with the conviction that the rejection of the plaintiff's testimony on the trial proceeded from a desire and a purpose to deprive him of his right to benefits, and this brings me to the second of the suggestions mentioned above as affecting the primary question of the irregularity of the proceedings, to wit: a consideration of the character of the testimony offered in connection with the charge upon which the plaintiff was being tried. When the case was heard before the master the parties were fully heard upon all their allegations.

The master finds, upon voluminous testimony, that at the time the charges were preferred Rosenberger was afflicted with a very serious disease known as prolapsus ani, and a general disorder of the blood that caused a peculiar eruption of the skin which was specially painful when any physical labor was attempted. After describing the effect of using croton oil to increase the eruptions, but to relieve the patient, he concludes in reference to the charge made against the plaintiff thus:

"The charge, therefore, of using it [the oil] from improper motives is not sustained by the evidence. The testimony of Dr. John-

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son, Dr. Slifer and Dr. Moyer, as well as that of himself, his wife and several neighbors, is to the effect that at that time he was actually suffering from a chronic disease which prevented him from following his usual avocation. The testimony to the contrary amounts to absolutely nothing to disprove this. I think the charge was entirely false."

This finding of the master is not controverted by the defendant, either in the printed or oral arguments, and it must be taken as an absolute verity, well sustained by ample testimony. It is alleged in the counter statement, and not denied, that the plaintiff was sixty-eight years of age in 1881; and it was found by the master that he had always paid his dues from 1849 to 1885, and upon the testimony of three physicians that he had continued to be unable to do any physical labor down to the time their testimony was given. We have then the case of an old, sick, disabled member of this order, who for thirty-five years had faithfully paid into the treasury of the order all the dues required of him, being at last afflicted with a serious and apparently incurable disease, such as to prevent him from following his usual avocation, preferring his application for benefits to the society which had taken his money for so many years; the right to have these benefits was also guaranteed to him by the eighth article of the constitution.

The defendant must not for one moment be regarded as either a religious or a charitable association. Its benefits are sold to those who pay money for them; and the right to have them is a contract right, pure and simple. This plaintiff had most fully paid for the benefits he claimed; and if the merits of the case were to be considered as they appear upon this record, he seems to have established an incontestable right to them. But independently of the question of merits the undisputed facts are that almost immediately following his claim for benefits a charge was preferred against him of feigning the sickness upon the ground of which his claim to benefits was made. His only claim, at that time, was for the first two weeks' benefits, and they were refused; subsequently, when it had become apparent that he was likely to continue in the same condition and become a burden, the charge of feigning his sickness was preferred against him. It was a most serious charge. It involved not only a breach of his duty as a member but a high degree of moral turpitude and a deliberate purpose to defraud the order. Un-

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doubtedly, he had the common right of all accused persons to prove the falsity of the charge and his own entire innocence, if he could. His judges, his jurors, his accusers and his debtors were one and the same, to wit: the order to which he belonged.

It might be supposed that with so many advantages in their favor he would at least be accorded the very small privilege of a fair trial guaranteed to him by the constitution of this order. But it was not to be. When he offered to prove the falsity of the charge preferred against him, by the testimony of a disinterested witness, who had ample knowledge of the facts and was peculiarly qualified by his profession and his actual treatment of the plaintiff's disease to testify respecting it, he is denied the right to submit his proof, the mouth of his witness is closed, and as a matter of course the case is forthwith decided against him. The pretext upon which his testimony was rejected is so utterly worthless that it is impossible to credit its sincerity. In rejecting it a peremptory provision of the constitution of the order was distinctly violated, and the proceedings in this respect were conducted by a positive breach of its terms. The charge which was preferred against the plaintiff has since been conclusively found to be a false charge, without any foundation in testimony. If there were the least doubt of the insincerity of the defendant in preferring the charge and in conducting the trial of the plaintiff, that doubt is entirely swept away by the fact that after full knowledge of the plaintiff's actual sickness and the falsity of the charge against him, as furnished by the proceedings in the present case, the defendant still continues in a most persistent effort to escape the performance of its contract duties to the plaintiff.

For all these reasons I am not able to believe that when the testimony of Dr. Johnson was rejected it was done for any other purpose than to deliberately defraud the plaintiff of his rights. The preferment of a false charge against an innocent person, and persisting in it when the fact of the falsity is offered to be proved by competent and credible testimony, is so shocking to every sentiment of right and honor that it is impossible to associate it with integrity or honesty of purpose. Entertaining these convictions as I do, so earnestly and sincerely, I am altogether unable to agree with the majority of the court in their disposition of this case; and I am therefore constrained to dissent therefrom. I agree to the other irregu-

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larities found by the master and the court, but it is unnecessary to discuss them.

I would affirm the decree of the court below.

Court of Common Pleas of Luzerne County.

GRIMES VS. KACH.

In an action of trover before a justice of the peace the plaintiff claims *forty* dollars damages; after hearing, the defendant being in default, judgment was rendered against him for *fifty* dollars. *Held*, that the judgment must be reversed.

The rule that in actions sounding in damages the plaintiff can recover no more than the amount laid in his declaration applies to the claim of a plaintiff in a suit before a justice.

CERTIORARI.

John D. Hayes, Esq., for plaintiff.

Gustav Hahn, Esq., for defendant.

The facts fully appear from the opinion of the court delivered by RICE, P. J.

This was an action of trover and conversion in which the plaintiff claimed *forty* dollars damages for the conversion of a sum of money (not named or otherwise identified) paid to the defendant, a justice of the peace, for plaintiff, as satisfaction for personal injuries done to the latter by certain persons who were arrested and taken before the defendant on a criminal charge. After a partial hearing of the case, at which the defendant was present, it was adjourned. At the adjourned hearing the defendant did not appear, and after the plaintiff had introduced further testimony the justice gave judgment in his favor for *fifty* dollars and costs.

Probably the evidence justified the amount awarded, but the plaintiff having limited his claim to a less amount we do not see how the judgment can be sustained. The difference between the claim and the judgment is too great to be accounted for upon the assumption that it was the interest which had accrued in the meantime. The rule that in actions sounding in damages the plaintiff can recover no more than the amount laid in his declaration applies here, and for the same if not a stronger reason. Unfortunately we have not the same power to correct the mistake, for, of course, we can not cure it by amendment, as was done in the cases of Miller

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vs. Weeks, 10 H., 89, and Trego vs. Lewis, 8 Sm., 463; and no offer has been made to remit the excess, as was done in Spackman vs. Byers, 6 S. and R., 385. See Lantz vs. Frey, 7 H., 366. Furthermore, while it is true that under certain circumstances this form of action may be maintained for the conversion of money, we gravely doubt whether this is such a case. We regret that we are compelled to set aside this judgment on technical grounds, for, on the face of the record, and according to the evidence set forth in the transcript, the plaintiff's claim is a very just one and ought to be paid. It is not to the credit of the administration of justice that his money should be withheld unless there is some substantial reason for so doing. Of course we speak only of the case as it appears on the face of the transcript.

The judgment is reversed.

Court of Quarter Sessions of Montgomery County.

License of Alexander Niblock.

One licensed to keep a restaurant, who violates the law by selling whisky, selling on Sunday and to minors, deserves to have his license revoked.

Rule to show cause why license should not be revoked.

Isaac Chism and *H. K. Weand, Esqs*, for rule.

J. V. Gotwalts and *H. B. Dickinson, Esqs.*, contra.

The facts fully appear from the opinion of the court delivered May 17, 1886, by Boyer, P. J.

This license was granted in conformity to the practice of our court to renew an old license pending a remonstrance until the merits of the remonstrance can be properly investigated and considered.

This has now been done; and we find that upon the facts in evidence it is impossible to continue this license without a disregard of the proper observance of the law and the duties which the court owes to the community and to its own self respect.

It appears that the applicant has habitually violated the obligations of his license in selling whisky; selling liquor on Sunday; and selling to minors. In so doing he has not only offended against the laws of the state but has broken his solemn affirmation made to the

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court that he would sell no liquors, or knowingly allow them to be sold or drank upon his premises, except those permitted by his license. He is therefore no longer worthy of the confidence of the court.

And now, May 17, 1886, the rule is made absolute and the license revoked.

See next case.

Application of Alexander Niblock.

A person whose license was revoked a year previous for violation of the liquor laws is not a proper subject to receive a new license, unless some strong affirmative testimony of a change in disposition of applicant is adduced.

Application for license to keep a restaurant in Upper Dublin township.

J. V. Gotwalts and *H. B. Dickinson, Esqs.*, for application.

Isaac Chism, Esq., contra.

The facts fully appear from the opinion of the court delivered June 6, 1887, by Boyer, P. J.

This application comes from a person whose license was revoked last year for the violation of the conditions upon which his license had been granted. The liquor laws to which he was subject were broken by him in almost every possible form, in disregard of the solemn pledge he had given to obey them. Although it is true a violater of the law may reform—and we do not mean to say that a license once revoked for such cause will never be restored by this court—yet to induce such confidence there should be something shown to inspire a reasonable belief of a change in the disposition and intentions of the offender. There is no evidence before the court of this nature; none to show in what manner the applicant has conducted his establishment during the period for which he had no license, and whilst it was, we understand, still kept open as a place of entertainment. Upon this point it would have been proper in such a case to present some affirmative testimony. But even the applicant himself is silent on the subject, and seems to rely upon the testimony taken a year ago, which is unfavorable. We are therefore constrained to refuse this application.

And now, June 6, 1887, license is refused.

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Orphans' Court of Bucks County.

Estate of Hannah W. Horner, Dec'd.

Where, from the entire will, it appears that the testator intended to use omitted words, they may be supplied.

A testator directed the share of a daughter in his estate to be placed in trust for her life, and at her death to be divided among her surviving heirs, or by her last will and testament, if she executed one. The daughter willed the income to her husband for life, and at his death the principal to certain of her children.

Held, she had the power to do so, and executed the power by such a will.

She, having directed her debts to be paid out of the fund, the distribution should be made through her executor.

Exceptions to auditor's report distributing the balance in the hands of Samuel W. Spencer, trustee of Hannah W. Horner (now deceased), under the will of Jacob H. Rogers, deceased.

George W. Rogers, Esq., for exceptants.

George Ross and *L. L. James, Esqs.*, contra.

The facts appear from the opinion of the court delivered August 9, 1887, by Yerkes, P. J.

The omission by the testator, Jacob H. Rogers, to repeat in the bequest to Hannah W. Horner the words "to be divided" after the word "or" in the concluding or alternative part of the seventh clause, can not affect the apparent meaning of the bequest as shown by the whole will.

If, from the entire will, we can gather the intention of the testator to use the omitted words, they may be supplied.

"It is an established rule, in the construction of wills, that, when it is evident the testator has not expressed himself as he intended and supposed he had done, and the defect is produced by the omission of some word or words, and where it is certain beyond reasonable doubt what particular words were thus omitted, they may be supplied by intendment and the will read and construed as if those words had been written in the place or places where they were intended to have been." 1 Redfield on Wills, p. 454, sec. 33; 2 Jarman on Wills, 60; Williams on Executors, X 1085.

"We may construe a will, and from what is expressed necessarily imply an intent not particularly specified in the words." Chapman vs. Brown, 3 Burr, 634. And says Justice Thompson: "It

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sometimes happens, however, that through ignorance or mistake of the testator or drawer of the will, words are omitted or inserted which have left unexpressed or wrongfully expressed what clearly appears to have been the intention of the devisor from the whole tenor of the will, and which are necessary to carry it out; the rule in such cases is well settled that the courts will permit the will to be read as if the words omitted were inserted and those wrongfully inserted omitted, and in the place or places where intended to be omitted or inserted." McKeehan vs. Wilson, 3 P. F. S., 74.

The cases where words have been thus supplied or transposed are numerous. See Graham vs. Graham, 3 Clark, 212; Holland's Estate, 6 W. N. C., 469; Zerbe vs. Zerbe, 3 Norris, 147; Hellerman's Appeal, 19 W. N. C., 269; 44 Leg. Int., 300; Sidney vs. Shelly, 19 Ves., 352.

If we attempt to read Mr. Rogers' will without the words "to be divided" understood as preceding the concluding direction in the gift to Hannah W. Horner, it is impossible to place an intelligible meaning on that part of the will. But the use of these words in that connection makes clear the entire paragraph; and that the testator intended that they should be so used seems apparent. We think, therefore, that the learned auditor did not commit any error in supplying the words, and in placing the construction upon the entire paragraph which he reports.

Having thus ascertained the testator's intention in respect to the direction in question, we may proceed to ascertain what estate or interest he intended to give to his daughter Hannah, the extent of the power conferred, and what disposition her will makes of the property.

The estate which Hannah W. Horner received through the will of her father, Jacob H. Rogers, was not absolute, but for life, with a power of appointment.

The will of Mr. Rogers leaves little room to question the extent of the power conferred on Hannah. The testator clearly intended that, subject to the trust imposed upon her share in his estate, she should exercise over it whatever control she might have over an absolute gift, and therefore when he came to provide for the trust he declared that the amount set aside as her share should be divided by her last will and testament if she should execute one. How divided? It is contended that the power of appointment was

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restricted. But the direction for a division amongst her surviving heirs only applies in the event of a failure on her part to execute a will disposing of the estate. The disjunctive "or," used by the testator, does not permit us to attach to the power of appointment following it the restrictive words which precede it, and which were intended to affect only the disposition of the estate upon a failure to execute the power.

We are clear that the power of appointment is a general one, and can not see how any other interpretation can be placed upon the testator's language.

The power of appointment was fully executed by Hannah W. Horner through her will of May 6, 1883. The act of June 4, 1879, settles every doubt which might otherwise arise upon this point, and it seems useless to discuss it in the light of that legislation.

The exceptant raises a further question. He insists that the auditor erred in distributing the whole fund to the executor of Hannah W. Horner, deceased. We think that the distribution is strictly in pursuance of the exercise of the power of appointment by the donee. She, by her will, subjected the fund to the payment of her debts and funeral expenses. It is true that in the absence of such a direction the fund would not have been liable to these. Yet she had the power to make it so by a declaration in her will.

The debts and expenses charged upon the fund can more properly be settled by the executor of Mrs. Horner's will. He is the person to administer the estate and pay off those liabilities, and therefore the fund should be distributed to and through him and not directly to the appointees under the will. See Stokes' Estate, 3 Co. Court Rep., 193. We are unable to find any merit in the exceptions.

And now, August 9, 1887, the exceptions are dismissed and the report of the auditor confirmed.

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Orphans' Court of Lancaster County.

Estate of Lewis Jenkins, Deceased.

Where a mortgage is a lien upon a tract of land, and a petition is presented to the Orphans' Court for an order of sale to sell for the payment of debts, the court may decree the property to be sold in the whole or in parts; and, if in parts, that each part shall be subject to such portion of the mortgage as the mortgagee and the administrator shall agree.

Petition for order for sale of real estate for payment of debts.

The petition of Samuel Alexander, administrator of the estate of Lewis Jenkins, deceased, set forth that the said Lewis Jenkins died on July 19, 1887, intestate, leaving to survive him a widow and six children; that the personal estate of the decedent was insufficient for the payment of his debts; that there is a mortgage on the real estate of decedent, held by Joseph Harnish, for the sum of $5,000; that the said Lewis Jenkins died seized of a farm or tract of land situated in Mastic township; and the petition closed with a prayer for an order of sale of the real estate for the payment of debts.

George Nauman, Esq., for petition.

The opinion of the court was delivered August 16, 1887.

This is the first case in our court since the passage of the act of 1887 relating to preservation of the lien of a mortgage upon a judicial sale, and may fix the practice. As it will be to the advantage of the estate to sell in parts the tract covered by the mortgage, we desire the court to decree a sale of the property in whole or in parts; and, if sold in parts, each part to be made subject to such portion of the mortgage of Joseph Harnish as may be agreed upon by him and the administrator.

And now, August 16, 1887, the order of sale is awarded as prayed for.

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Court of Common Pleas of Montgomery County.

JAMES MOIR vs. GEORGE S. EMERICK & CO.

The court will refuse to open judgment under disputed facts where the preponderance of the testimony is in favor of the legality of the judgment.

An entry on the books of the partnership can not prejudice the rights of a creditor to whom one of the partners has confessed judgment for a partnership debt.

MOTION to open judgment and let the defendant into a defence.

John Dolman, Esq., for rule.

H. K. Weand and *David Ross, Esqs*, contra.

The facts appear from the opinion of the court delivered September 19, 1887, by SWARTZ, J.

The testimony adduced on this rule is not sufficient to authorize the court to open the judgment. That the judgment is good for $2000 is not disputed. Partnership property may be sold on an execution issued on a judgment confessed by one partner in the firm name for a partnership debt. Ross vs. Howell, 3 Norris, 129.

We think it is equally clear that the $1400 is properly included in the judgment note. Whether such confession of judgment was for the best interests of the firm or manifested a proper spirit towards the non-assenting partner, is immaterial in this controversy, which raises only the legality of the confession. One partner can bind the firm in any matter that is within the scope of their business transactions; he can even bind the firm by a transfer of the whole stock in trade. Deckard vs. Case, 5 Watts, 22. It is certainly an ordinary business transaction for individuals and firms to anticipate the payment of their interest-bearing debts, and therefore within the authority which enables one partner to bind the firm. The right which one partner has to confess judgment for a partnership debt seems to include the right to anticipate the payment of the claim.

Where one partner furnishes a sum of money as part of his stipulated capital, his confession of judgment in the firm name for such money will not bind the firm even if it be shown the money went into the firm business. McNaughten's Appeal, 101 P. S. R., 550. In our case, however, even under George S. Emerick's version of the transaction, the $1600 was not part of the stipulated capital but was furnished by Roscoe K. Moir over and above his re-

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quired capital, and used by the firm with the knowledge of Emerick. It is difficult to see how Emerick was injured by the confession of judgment which included the $1600. True, it is his duty to protect the creditors of the firm, and their equity to be paid out of the firm assets may be higher than that of his partner Moir, but as Emerick alleges sufficient partnership property to pay all creditors they need no such protection.

We prefer, however, to sustain the judgment as to the $1600 on the ground that Emerick's version of the transaction is not sufficiently supported by the testimony. James Moir swears positively that he loaned the $1600 to the firm, and in support of his allegation produces his individual check to the order of the firm for $500 as part of that sum. It is further shown that $500 more were furnished by paying with his own check bills of the firm forwarded by Emerick, and that the balance of the loan, $600, was deposited by him to the credit of the firm. Roscoe K. Moir swears it was a loan to the firm, and corroborates his father. To meet their testimony Emerick says that the books show that the $1600 was furnished by his partner as additional capital. His knowledge on the subject is derived from the books. He further says that he drew interest on this $1600; an examination of the books shows that Moir was credited with such interest but never drew it from the firm. This entry on the books is alleged to be a mistake of the book-keeper, and it is shown that a similar mistake occurred when James Moir loaned the $2000 to the firm. Any entry that the partners made on their books can not prejudice the rights of James Moir. The partners can not convert a firm debt into an individual loan.

The testimony then stands as follows: The lender James Moir and the partner who negotiated the loan with him are contradicted by an inference drawn from an entry in the firm books made by a clerk. The court can not disturb a judgment upon such unsupported testimony. A verdict of the jury against the judgment upon such testimony ought not to be sustained, and this is a safe test. Association vs. Rood, 12 Luz. L. R., 9.

A judgment will not be opened where the testimony of the plaintiff and defendant counterbalance. Earley's Appeal, 90 P. S. R., 321; Zaring vs. Earley, 2 Pears., 352.

A judgment will not be opened upon the unsupported affidavit of the defendant contradicted by the plaintiff on oath. Kocher vs. Rice, 2 Luz. L. R., 24.

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In Wernet's Appeal, 91 P. S. R., 322, the court say: "We have "several times decided lately that on an application to open a judg- "ment it is proper for the court to weigh the evidence and to de- "cide according to the preponderance thereof."

In Earley's Appeal, *supra*, it was held that judgments were not to be thrown open in all cases on the oath of the party alone against the oath of the other party. In such a case the writing must prevail and the judgment remains undisturbed.

The burden of proof rests upon the petitioner to establish a defence to the judgment whether the averment be a denial of the execution of the note, a denial of any consideration, failure of consideration, or fraudulent use of the obligation. Roenigk's Appeal, 2 Central Rep., 68.

And now, September 19, 1887, the rule is discharged.

IN EQUITY.

ROSCOE K. MOIR VS. GEORGE S. EMERICK.

If a partner draw from the firm assets more than his share of tne profits, and appropriates it to his own use, he is guilty of such a fraud as will be restrained by injunction, what acts are sufficient to call for the appointment of a receiver.

BILL in equity to dissolve partnership.

H. K. Weand and *David Ross, Esqs.*, for plaintiff.

John Dolman, Esq., contra.

The facts fully appear from the opinion of the court delivered September 19, 1887, by SWARTZ, J.

The facts disclosed by the answer and affidavits in this case convince us that the preliminary injunction should be continued. George S. Emerick, under the articles of copartnership, was not to furnish any money for the business venture. He was allowed to draw from the profits of the firm a monthly allowance for his time and services, to be deducted from his share of the profits. He confessedly overdrew his account the first year, and still more for the six months of the second year.

Notwithstanding this overdraft, he admits that he appropriated, without the consent of his partner, $300 of the firm money in pay-

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ment of his individual debt. In violation of the articles of copartnership, which stipulated that James Moir should be the financial manager of the firm, and sign all checks, drafts and notes, Emerick drew a check in the firm name for the entire partnership funds in bank. He says he was informed that the financial manager was too sick to attend to his duties. It does not appear that the financial manager failed to attend to the needs of the firm; but, on the contrary, Moir, the manager, now swears that this act of Emerick was without his knowledge or consent. Emerick did not have the consent of his partner to thus interfere with the firm's money. He also collected over $2000 from debtors of the firm, and over $500 of these collections are still in his hands; he failed to deposit them to the credit of the firm or to turn them over to the manager. These acts, especially the appropriation of firm money to pay an individual debt, call for a continuance of the preliminary injunction. "To pay "private debt out of firm assets is a fraud—an actual fraud; it is "taking the money of one person to pay the debt of another, and "being an unlawful act may be restrained by an injunction." Gallagher vs. Bank, 5 Central Rep., 728.

The bill and answer both pray for a dissolution of the partnership, and for the protection of all parties interested a receiver should be appointed. The failure of the partners to agree as to the disposition of the partnership assets, the violation of the terms of copartnership on the part of Emerick, his misappropriation of the firm's assets, the embarrassed condition of the firm as shown by the execution, all call for the intervention of a receiver, especially so when the partner who furnished all the cash capital and the creditor who holds four-fifths of all the indebtedness of the firm demand a receiver. "When a dissolution is intended, or has already taken "place, a court of equity will always appoint a receiver, provided "there be some breach of the duty of a partner or of the contract of "partnership." Sloan vs. Moore, 37 P. S. R., 222.

And now, September 19, 1887, the preliminary injunction is continued, the partnership is dissolved, and Israel W. Hart is appointed receiver upon giving bond in the penal sum of $10,000, to be approved by the court.

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JOHN HAUSMAN AND WIFE VS. N. A. FREY, CONSTABLE.

In an action of trespass against a constable, an amendment, adding the names of sureties on constable's bond as co-defendants, made a long time after suit brought, was denied.

RULE to amend the suit by adding names of sureties on constable's bond as co-defendants.

A former adjudication on this same suit will be found in 2 MONTGOMERY COUNTY LAW REPORTER, 13.

William F. Dannehower, Esq., for plaintiff.

John W. Bickel, Esq., for defendant.

The facts are fully disclosed by the opinion of the court delivered September 19, 1887, by SWARTZ, J.

This is an action of trespass *vi et armis* against a constable for levying on and selling the goods of a stranger.

The suit was instituted in July, 1885, and arbitrated. February 9, 1886, an appeal was taken. The award was rendered after a hearing of the parties, their witnesses and counsel. We are now asked, at this late day, to add the names of the sureties on the constable's bond as codefendants with the constable on the ground that there was an omission when the suit was brought. No evidence of any omission is furnished in support of the application. Instead of being an omission it is an attempt on the part of the plaintiffs to seek a different mode of redress from that originally contemplated in their suit. There is no application to change the form of action, and we can not understand how the plaintiffs can recover of the sureties except by proceedings on the constable's bond.

The second section of the act of May 4, 1852, P. L. 574, can not be interpreted so as to cover plaintiff's application. The amendment is not necessary to secure a trial on the merits. If the constable's liability is established in the suit as it now stands, the sureties are concluded. Musselman vs. Com., 7 S. and R., 240.

And now, September 19, 1887, the rule is discharged.

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City of Easton vs. County of Northampton.

CLINTON RORER, ASSIGNEE, &c., vs. H. BROOK.

SAME vs. SAMUEL M. WILSON.

Interpretation of a rule of court permitting plaintiffs in appeals from justice of the peace to take judgment for want of an affidavit of defence.

RULE to amend assessment of damages.

These actions were originally brought before a justice of the peace, who gave judgment for plaintiff but failed to add interest to the original debt. The defendants appealed, and failing to file an affidavit of defence judgment was entered by plaintiff for original debt and full interest instead of the amount of judgment of the justice with interest thereon. Hence these rules.

I. P. Wanger and *Larzelere & Gibson, Esqs.*, for rule.

Jacob V. Gotwalts, Esq., contra.

The opinion of the court was delivered September 19, 1887, by SWARTZ, J.

The rule of court provides "the plaintiff having filed a declara-"tion or statement and copy of his claim within the first week of the "term, shall be entitled to a judgment for the amount of the judg-"ment of the justice with interest and with costs."

The interpretation of this rule is too clear for argument. The judgment of the justice is not to be disturbed except to add interest from the date of its rendition.

And now, September 19, 1887, the rule in each of the above cases is made absolute.

Court of Common Pleas of Northampton County.

CITY OF EASTON VS. COUNTY OF NORTHAMPTON.

It is the duty of the County Commissioners to complete the approaches to a bridge built at the expense of the county, although said approaches are on one of the streets of a city within which the bridge is built.

CASE Stated.

The facts are set forth in the following Case Stated:

"And, now, September 10, 1887, it is hereby agreed by and between the parties to the above suit that the following case be stated for the opinion of the court, in the nature of a special ver-

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dict. On the 12th day of October, 1885, a petition was presented to the Court of Quarter Sessions, setting forth the fact that the bridge on 13th street in the borough of Easton, crossing the Bushkill creek was unsafe for travel; that it was a nuisance, and if not speedily removed it would fall into the creek. Whereupon six men were appointed to view the said bridge, who on the 14th day of December, 1885, reported that it was not only a nuisance but also dangerous on account of its rotten and delapidated condition—That said report was confirmed by the Court, and on the 18th day of December, the grand jury approved of the same. The County Commissioners in the exercise of their duty removed the structure and erected in place thereof a new bridge,—The said bridge is now completed, the height of which does not conform to the grade of the streets leading thereto; that wing walls of about ten feet have been erected beyond the abutment but this does not make it safely accessible for foot passengers—That without additional walls and railings thereon the approach to said bridge is dangerous and incomplete, caused chiefly by the water from the streets of the city. If the Court be of the opinion that it is the duty of the city to complete the entrance to said bridge then judgment to be entered against the city for costs. If the Court should be of the opinion otherwise, then judgment to be against the county for costs—either party reserving the right to sue out a writ of error."

Aaron Goldsmith, Esq., City Solicitor for the city of Easton.

C. Albert Sandt, Esq., for county of Northampton.

The opinion of the Court was delivered by REEDER, J.

The question raised on the admitted facts is, whether the County Commissioners, having constructed a county bridge without completing the approaches to the bridge so as to make it convenient to public travel, have done all that they are required to do? Or, to state the proposition differently, have the County Commissioners performed their full duty when they have built the bridge structure, and is it the duty of the city to build the approaches? The only difficulty with the Court is to understand how under recent decisions there should be any doubt on the part of the Commissioners about the law; a doubt, I understand, not shared by the Commissioners' solicitor. A bridge is part of the highway. It is simply that part of the highway which crosses a ravine or a stream of water. It being more

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expensive than highways generally, it is made under certain circumstances the duty of the county to construct those portions of highways denominated bridges. Have they performed this duty when they build a bridge inaccessible to the traveling public? When an old, insufficient and inconvenient bridge is removed to make way for one which will be more convenient to public travel, to leave it in a condition which is inaccessible is to remove an inconvenience to replace it with a nuisance. For an inaccessible bridge, and all bridges are inaccessible without approaches, is a public nuisance because an obstruction of a public highway. It is as much of an obstruction of a public highway to build a bridge without approaches by the county as to build a fence across a highway by an individual, and the Commissioners in the one case are just as guilty of an erection of a nuisance as the individual in the other. It is true that in the construction of a bridge within a municipality, the county is not bound to conform to the grade of the street of which the bridge forms a part, but the Commissioners may build in the manner and at the grade most convenient to them, but having built, it is clearly their duty to make the bridge accessible from the street and also to see that the bridge forms no obstruction to the running off of the surface water from the adjoining streets.

This question is very concisely discussed by Justice Gordon in Penn township vs. Perry county, 28 P. F. Sm., 454. He says: "That the approach to a bridge is part of the highway is doubtless "true but so also is the bridge itself; and as the construction of "this part of the highway is too expensive for the township to bear, "therefore it is imposed on the county. The design of bridging is "to provide a safe and convenient passage for the public over some "ravine or stream, but no such passage is afforded when the struc- "ture can not be approached. Can a house be said to be finished "until there are steps to its doors or stairs to its chambers? And "how can a bridge be said to be completed without the proper "means of access? Certainly this is so necessary to its use, that "without it the structure is a vain thing; utterly useless and of no "account. The bridge is incomplete until everything necessary for "its proper use has been supplied, and every such necessary appli- "ance is part of the bridge."

Now, September 22, 1887, judgment is entered on the case stated in favor of the city of Easton and against the county of Northampton for the costs.

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Supreme Court of Pennsylvania.

BROWNBACK VS. OZIAS.

Although a mortgage discharged by a judicial sale may be continued a lien upon the premises by the agreement of the party holding the title, it is in the nature of an unrecorded mortgage, and will not be good against a subsequent purchaser of the premises at Sheriff's sale.

A deed contained a charge "under and subject to the payment of a certain mortgage of "$1000 unto George Grubb, of Chester county." George Grubb was the assignee of a mortgage of that amount which had been divested by an Orphans' Court sale. The assignment to Grubb was not recorded. *Held*, this charge was not sufficient notice to a subsequent purchaser that the parties had agreed to continue the lien of said mortgage, or to put him upon inquiry in relation thereto.

Brownback vs. Ozias, 2 Montg., 1, affirmed.

ERROR to the Court of Common Pleas of Montgomery county.

The facts of the case, as well as the opinion of the court below by BOYER, P. J., was reported in full in 2 MONTGOMERY COUNTY LAW REPORTER, 1.

G. R. Fox, Franklin March and *H. M. Brownback, Esqs.*, for plaintiff in error.

The words "under and subject" are apt words to impose a lien. Echelberger vs. Gitt, 41 Leg. Int., 290.

Notice derived from the recitals in the deed to a purchaser is actual, though it rests upon a presumption of law. White vs. Foster, 102 Mass., 375; George vs. Kent, 7 Allen, 16.

"Whenever a purchaser has notice that the estate is affected by other interests than those of the vendor of the legal title, he is bound to inquire into the extent of these interests." Sergeant vs. Ingersoll, 7 Penna. St. R., 340; Parks vs. Chadwick, 8 W. and S.

What is sufficient to put a party upon inquiry is in equity held to be good notice to bind him. Billington vs. Welsh, 5 Barr, 134; Speer vs. Evans, 11 Watts, 141; York Bank's Appeal, 12 Casey, 458; Milton's Appeal, 15 Norris, 477; Boggs vs. Vernon, 6 Watts, 469; Epley vs. Wortman, 7 Id., 163; Lodge vs. Simonton, 2 P. and W., 439; Milliken vs. Graham, 22 P. F. S., 490.

Whatever is sufficient to put a party upon inquiry, which would result in the information, is equivalent to notice. Argnier vs. Schaffer, 22 P. F. S., 109; Knoff vs. Thomson, 4 Harris, 364; Bellos vs. Lloyd, 2 Watts, 41; Ogden vs. Roterfind, 10 Casey, 191; Maule vs. Reder, 9 P. F. S., 167; Park vs. Neely, 9 Norris, 59.

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An agreement by the purchaser to take subject to a lien estops himself or his vendees with notice from denying it. Stackpole vs. Glasford, 16 S. and R., 163.

Where an agreement was made by the parties before acknowledging an Orphans' Court deed that a certain deed should be taken subject to the payment of the mortgage, and that much of the purchase money was deducted from the sum at which the premises were sold, the purchaser was estopped from denying the continued existence of the mortgage. Jermon vs. Lyon, 81 Penna. St. R., 107; Dexter's Appeal, 2 W. N. C., 621.

An agreement by the purchaser to take subject to a lien estops himself or his vendees with notice from denying it. Jerome vs. Lyn, *supra;* Zeigler's Appeal, 11 Casey, 173; Loomis Appeal, 10 Har., 318.

A verbal promise to assume and pay a mortgage is valid. Merriman vs. Moore, 90 Penna. St. R., 78.

A mortgage unrecorded or defectively recorded is valid against a subsequent judgment creditor with notice. Britton's Appeal, 9 Wr., 172; Parker vs. Wood, 1 Dall., 459; Nice's Appeal, 4 P. F. S., 200.

Charles Hunsicker and *Samuel Money, Jr., Esqs.*, for defendant in error.

The greatest effect that could be claimed for the clause in the deed was that it created an equitable lien for so much purchase money, which was discharged by Sheriff's sale. Pierce vs. Gardner, 2 Norr., 211; Stewartson vs. Watts, 8 Watts, 392; Hiester vs. Green, 12 Wr., 96.

A purchaser at Sheriff's sale is not bound to look beyond the record as to the effect of the sale in discharging a prior mortgage. Magaw vs. Garrett, 25 Penna. St. R., 319.

The opinion of the Supreme Court was delivered October 3, 1887, by Mr. Justice Green.

It is not at all questioned that the Orphans' Court sale divested the lien of the mortgage in suit. The whole record of that proceeding was in confirmation of that result. When the administrators of John Walters, the mortgagor, filed their account in March, 1867, they claimed and were allowed credit for the payment of the mortgage. When Hartzell conveyed to Wood it was subject "to the payment of a certain mortgage of $1000 unto George Grubb, of the

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county of Chester." In point of fact there never was a mortgage which corresponded with that description, and hence any amount of inquiry would never have developed the existence of such a mortgage. But it is argued that George Grubb's interest in the original mortgage to Jacob Welker might have been discovered if Ozias had made inquiry of Hartzell, Wood, and Mitchell. Possibly this might be so; but George Grubb's interest in a mortgage made to some other person is not the fact mentioned in the charge contained in the deed from Hartzell to Wood, and hence Ozias was not bound to inquire for it any more than he would have been bound to inquire for any other fact extrinsic to the record known to his predecessors in the title and affecting his interest. That which appeared in the language of the charge contained in the deed from Hartzell to Wood would bind a purchaser, of course; but why should he be bound by matter which did not appear there? At the best this sort of notice is but constructive notice, and it is quite enough to hold a purchaser bound by that which does appear upon the record, without subjecting him to responsibility by construction for that which does not appear there.

The mortgage which is now claimed against the defendant is the original Walters mortgage, but of that instrument there is no kind of description—not even an allusion to it—contained in the deed from Hartzell to Wood. Why should a subsequent purchaser inquire for that mortgage when there was nothing in the deed which in any manner indicated its existence? When the defendant examined the record he found that the Walters mortgage was discharged by the Orphans' Court sale, and paid, as indicated by the administrators' account of John Walters' estate. He therefore could not suppose that the description in the Hartzell deed of a mortgage payable to George Grubb could refer to it, and hence he was under no legal duty to inquire whether that description was intended to refer to that mortgage. If he was under no legal duty to make such an inquiry he is not chargeable with constructive notice for breach of such a duty. Grubb did not see fit to record his assignment of the Walters mortgage, and thereby prevented innocent subsequent purchasers from acquiring a knowledge of his interest in that mortgage by the method which the law recognizes as proper constructive notice. It was his own dereliction, and if loss to him is occasioned by it that loss must rest with him rather than with an innocent pur-

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chaser who, in consequence of that very dereliction, was prevented from acquiring a knowledge of Grubb's interest which would have enabled him to protect himself.

Between Grubb and Ozias, so far as this question is concerned, there is no equality of innocence. Grubb knew that he held an assignment of the Walters mortgage, and that he had not recorded it. He knew also that the mortgage was discharged by the Orphans' Court sale, and that its lien was only preserved, if at all, by a private agreement between Hartzell and Walters' administrators. He is presumed to know that while Hartzell would be bound by that agreement, it would not be binding upon a subsequent purchaser without notice. If he wished to preserve the lien of the mortgage debt against all persons he should either have taken a new mortgage in his own name, or at the very least placed his assignment from Welker on record, so that there would at least have been a duty of inquiry resting upon a purchaser. It is quite probable he was not a party to the insertion of the charge in the deed from Hartzell to Wood. If he was, his dereliction would be increased by the incorrectness of the description; if he was not, he can claim no benefit from it other than that which necessarily and technically belongs to it. Tried by that standard, the charge in the deed is in no sense notice of the mortgage from Walters to Welker made in 1829, and that particular mortgage is the only cause of action set up against the defendant Ozias.

It is almost needless to add that the charge in the deed itself is not available to the plaintiff as a lien, since it would constitute at the best but an equitable lien which was discharged by the Sheriff's sale at which the defendant purchased the land. Pierce vs. Gardner, 2 Norr., 211.

Judgment affirmed.

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Court of Common Pleas of Bucks County.

ISAAC STOVER AND JACOB STOVER VS. HENRY L. STOVER, DEFENDANT, AND HENRY O. STOVER AND H. CLAY STOVER, GARNISHEES.

When an attachment execution has been served, the fund attached becomes bound in the garnishee's hands, and he can not relieve himself of his accountability by conveying to another the land upon which the debt is also a lien.

The attaching creditor steps into the shoes of his debtor, invested with all his rights, and may also pursue a fund bound by the attachment from whomsoever it may be owing.

After an attachment is once laid on a fund, the debtor defendant's assignment of his claim will avail nothing against the attachment without regard to whether, in the meantime, the real liability to pay the debt shall have devolved upon a vendee of the garnishee.

ATTACHMENT in execution.

George Ross and *L. L. James, Esqs.*, for plaintiffs.

Hugh B. Eastburn, Esq., for defendant.

Henry Lear, Esq., for garnishee.

The facts fully appear from the opinion of the court delivered June 15, 1887, by YERKES, P. J.

Under the acts of Assembly the interest of the defendant, Henry L. Stover, in the sum of $3,000, bequeathed by Abraham Stover, and, by the terms of the will, secured as a lien on the mill property, devised to John T. Stover, was attachable in the hands of the garnishees, Henry O. Stover and H. Clay Stover, the then owners of the land upon which said sum was a lien. Detweiler vs. Grubb, 1 Ches. Co. Rep., 272.

It has been said that the assumption that the relation of debtor and creditor must subsist between a garnishee and a defendant would destroy the efficacy of the act of Assembly; and that any man may be made a garnishee in whose hands the debtor's legacy or interest is found, the terms employed by the act of Assembly being comprehensive enough to include all imaginable cases other than where the debt is *custodia legis*. Gochenauer's Ex'rs vs. Hostetter, 6 Harris, 420. The effect of the service, as declared by the statute, is that the debt or demand shall remain attached in the garnishee's hands. Where one is made a garnishee he must retain possession of the thing attached until the attachment is determined; and if the holder of a note under attachment negotiates it he commits a fraud upon the law. Troubat & Haly, 1192.

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If the amount due upon a note be attached in the hands of the maker, and it is negotiated after maturity, the attachment will be a good defence by the maker against the holder. Hill vs. Kroft, 5 Casey, 186.

Pending the attachment the rights of the parties are *sub judice*, and the garnishee becomes a stakeholder of the thing attached. There is no method by which he can divest himself of this responsibility imposed by the statute other than to pay the money into court or by obtaining a dissolution of the attachment. The service of the writ imposes certain personal obligations upon him which he can not escape by having another assume his place as debtor.

While the debt may be secured upon realty, and it would appear reasonable that by a transfer of the land to another the garnishee ought to be relieved from his liability, yet the statute declares otherwise, and gives to the debt a new quality. It says that from the time of the service of the writ all the debts and all deposits of money, and all other effects, legacies, lands and interests in decedents' estates, belonging or due to the defendant by the garnishee, are bound by it in the garnishee's hands.

The attaching creditor steps into the shoes of his debtor, and becomes invested with all his rights; the attachment is in effect an assignment of the thing attached. If the attaching creditor takes the place of his debtor he has a right to have, by some means, a legal settlement and liquidation of the debtor's claim against the garnishee. Pickersgill vs. Meyers, 3 Out., 604.

The garnishee can not lawfully evade such a settlement; if he attempts to do so he commits a fraud upon the law.

When the defendants conveyed the real estate upon which the interest attached in their hands was secured, it was their duty to make provision for the settlement of the attachment out of it; and when the debt became payable their vendee, by operation of the attachment act, became liable to be substituted for them. It appears in this case that some such arrangement was made, as the answers disclose the fact that the present owner of the liened real estate has refused to pay the fund attached to Henry L. Stover, but has retained it to await the result of this suit.

We think he has acted wisely, as, no matter who may now be primarily liable to pay the amount due the plaintiffs, the interest of the defendant, Henry L. Stover, was, by virtue of the attachment,

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transferred beyond recall to the plaintiffs, and they have the right to come in upon the fund in the hands of the owners of the property. By virtue of the service of the writ they had the right to pursue the garnishees, and also to substitution in place of the debtor.

It has been held that, in the event of the dissolution of a corporation, the court can not deprive an attaching creditor of these rights by dissolving the attachment, as thereby the debtor would have retransferred to him that which the statute had previously transferred to his creditor, and would find himself repossessed of that of which he had been legally dispossessed. The Supreme Court emphatically declares that it will not agree to construe the law so as to strip the plaintiff of his lawful lien upon his debtor's property. Pickersgill vs. Meyers, 3 Out., 604.

It seems but reasonable that what the court may not do in the case of the dissolution of a corporation, a garnishee will not be permitted to accomplish by a conveyance of the real estate upon which an attachment interest is a lien.

Subsequent to the service of the attachment, and after the transfer of the property, the debtor undertook to assign his interest to Mr. Eastburn. But he had nothing to assign until the plaintiffs should become satisfied. The law undoubtedly substituted them for him as the persons entitled to the thing attached, and the owners of the realty, with notice as is shown by the answers, could make a good defence against him. Hill vs. Croft, 5 Casey, 186. Mr. Eastburn, the assignee, had knowledge of the attachment proceedings; in fact, he was counsel for the defendant, and appeared of record to claim for him the benefit of the $300 exemption law. The remedial purposes of the attachment execution process would be defeated by giving any consideration to an assignment by the debtor under these circumstances.

We are clear that the plaintiffs are entitled to a judgment in their favor. The fund is awaiting a legal disposition and a determination of this suit.

By an application of the practice indicated in Pickersgill vs. Meyers, 3 Out., 604, and in Hays vs. Insurance Co., Id., 626, we might, upon the return of a rule or other suitable process, substitute Abraham Z. Stover for the garnishees named in the writ. But, as a matter of fact, he has appeared to these proceedings, and in their answers the garnishees state for him that he retains the fund in his

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hands because advised by counsel that it was unsafe to pay the fund to the debtor during the pendency of the attachment execution. His counsel at the bar admitted this and that he had notice of the proceedings.

We have already decided that as a result of the attachment the plaintiffs, by operation of law, are substituted for and are the equitable assignees of Henry L. Stover, and there can be no doubt of their capacity to release him and his land of the lien of the interest of the defendant, even though he was not originally summoned as garnishee.

And now, to wit, June 15, 1887, judgment is decreed, to be entered upon the answers and record appearance in favor of the plaintiffs for such amount as, by computation of the Prothonotary, shall be found to be the share of the defendant, Henry L. Stover, in the certain sum of $3,000 which, by the will of Abraham Stover, deceased, was directed to remain a lien upon certain real estate devised to John Stover, and now held by Abraham Z. Stover in fee, less the costs, which are to be deducted from said amount. Said judgment shall be entered against the garnishees named in the writ of attachment for the sum found to be in the hands of Abraham Z. Stover, and also against said Abraham Z. Stover, who appeared and made defence against said attachment.

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Court of Quarter Sessions of Northampton County.

COMMONWEALTH VS. OBERHOLTZER.

The owner in fee of a public street has no right to erect anything either upon or over the street to the inconvenience of travelers. They have the right to the unobstructed use of the street.

SUR RULE to show cause why the Sheriff should not be directed to abate the nuisance which the defendant was sentenced to abate.

F. W. Edgar, Esq., for rule.

W. S. Kirkpatrick and *G. W. Mackey, Esqs.*, contra.

The facts of the case appear in the opinion of the court delivered October 5, 1887, by REEDER, J.

The defendant was tried upon an indictment for the maintenance of a nuisance, and found guilty. The sentence of the court was that he should pay a small fine, the costs of prosecution, and abate the nuisance. A petition was subsequently presented to the court representing that the nuisance was not removed, and the court entered this rule. An answer was filed by the defendant, in which he sets forth that the nuisance complained of, viz., a building constructed across a public highway in the borough of Bangor, had been removed.

At the hearing it was admitted that the lower part of the building had been removed so that vehicles of all descriptions could pass along the public highway, but that the upper part of the structure remained over the street, forming an arch under which all persons using this highway had to pass. The defendant contended that this was a full compliance with the sentence of the court. The structure complained of was a two-story building. This was found by the jury to be upon the public street and therefore a nuisance, and the defendant sentenced to remove it. Of course the sentence of the court meant that he should remove so much of the building as was a nuisance. And if the removal of the lower part of the building was the removal of the nuisance, then this rule must be discharged. But unfortunately for the defendant his position is untenable. A man has no more right to maintain a structure over a street than he has in the street. A traveler has the right not only to use the road-

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bed of a highway for the purpose of public travel but he is also entitled to all the light and air he can obtain from the unobstruction of the street overhead. One is as much of a nuisance as the other. Any unauthorized infringement of the public highway, however slight, is a nuisance. Com. vs. Alburger, 1 Whar., 486; Taggart vs. Com., 9 Har., 527; Com. vs. Harris, 10 W. N. C., 10. And it is no excuse that the public convenience is not impaired thereby. Bacon's Abr., Vol. 4, Highways D, p. 675. The rule will therefore have to be made absolute.

Now, October 5, 1887, the rule is made absolute. And it is hereby ordered that a writ issue to the Sheriff of Northampton county, commanding him to remove the structure described in the indictment at the cost of the defendant, unless the defendant himself abate the same before the 12th day of October.

Court of Common Pleas of Luzerne County.

KILLEEN VS. HADDOCK & STEEL.

The statutory three months notice may be waived by a tenant, but such waiver will not be implied from a doubtful provision in the lease.

To give jurisdiction under the landlord and tenant acts to eject the tenant the waiver must appear of record.

A provision in the lease that at the expiration of a five days notice to quit the lease shall be null and void is simply a means by which the tenancy may be terminated, and does not take the place of the statutory provision requiring three months notice before proceedings can be commenced under the landlord and tenant acts.

Upon a reversal of proceedings to recover possession of leased premises restitution is not a matter of course. If the tenant voluntarily gave up possession after judgment, restitution will not be awarded.

CERTIORARI.

W. H. Hines, Esq., for plaintiff.

George W. Shonk, Esq., for defendants.

The opinion of the court was delivered January 4, 1886, by RICE, P. J.

This was a proceeding under the act of 1863 to dispossess a tenant. The record shows that the petition averred: First, a tenancy at will under a written lease; second, "which contained a provision that the said Killeen will give at any time the said Haddock & Steel quiet and peaceable possession of said premises at the termination of five days notice so to do; * * * at the expiration

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of said five days notice to quit said lease to be null and void"; third, that said five days notice to quit on July 6, 1885, was given, "whereupon, by force and virtue of the above provision of said lease, the same terminated and became at an end on said July 6, 1885"; fourth, that the defendants refused and neglected to comply with the notice; that the rent reserved in the lease was $6.50 per month. Summons issued July 24, 1885. The record then proceeds to state that, after hearing the parties, the justice finds the foregoing complaint to be just and true in all particulars; and, it appearing just and proper, enters judgment against the lessee, etc.

The justice having set forth the averments of the petition at length and with particularity, his finding that they are sustained in all particulars is sufficient without further repetition, provided the petition itself contains all the essentials. McKeon vs. King, 9 Barr, 213; Givens vs. Miller, 12 Sm., 132. The question then arises whether the petition avers sufficient facts to take the place of an averment of three months notice to quit. This statutory notice, being for the benefit of the tenant, may be waived by him in his written lease; but when the fact is so it must appear of record. Hutchinson vs. Potter, 1 Jones, 472. The counsel for the defendants in error argues that the foregoing provision quoted from the lease shows such waiver. We can not so regard it. The humane provision of the law which, it is contended, has been waived, ought not to be set aside except where it clearly appears that the lessee intended to waive it. Such waiver will not be implied from a doubtful provision in the lease. Now, there is a plain distinction between the notice which the parties stipulate for to terminate the tenancy and the notice which the statute requires as an essential requisite to jurisdiction under the acts of 1772 and 1863. The tenancy may be terminated by effluxion of time or by the giving of a prescribed notice, and the landlord may at once have a common law right to reenter or to bring an action of ejectment, without having a right to proceed under either of those statutes. Rich vs. Keyser, 4 Sm., 86; Greenleaf vs. Haberacker, 1 Woodw., 436. At first glance it might seem from the provision of the lease above quoted that the parties intended to substitute a five days notice for the statutory three months notice, but upon consideration of the whole clause it will be seen that it was inserted not for that purpose but as a condition precedent to the termination of the tenancy. The case is the same, then,

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as if, by the express terms of the lease, it had been terminated on July 6, 1885, and the tenant had agreed to quit possession on that day. In such case it could not be contended that the agreement to quit, without more, was a waiver of the statutory notice. No more can it be contended here that a similar agreement to give up possession when, by the happening of a contingency, the tenancy should be terminated, was intended to take the place of such notice and to authorize the landlord to commence proceedings at once under the statute. The only Pennsylvania decision covering this precise question which we have been able to find is Gault vs. Neal, 6 Phil., 61. The following extract from the opinion of Allison, J., conveys the idea which we wish to express more clearly than any language of our own choosing: "Construing this clause of the lease most strongly against the tenant, and most favorably for the landlord, no other meaning can reasonably be given to it or extracted from it than that it constitutes a mere promise to leave the premises at the end of the term, provided the lessor shall give him thirty days previous notice. In the usual course of letting the time for the expiration of the term is settled when the contract is made, and this is accompanied with a promise to leave when that time shall have come around. In the case before us the termination of the lease is dependent upon the doing of a preliminary act, and the promise to quit is conditional that a certain notice shall be given. In one case the promise is no stronger than in the other case, and if three months notice is required in the first it follows that it is essential in the last."

The justice has sent up the lease which was put in evidence on the trial. It contains subsequent provisions which would undoubtedly show a waiver of the statutory notice, but they are not made part of the record, and of course we must decide by the findings which the justice has put upon the record and not by the evidence which he may have had before him. The plaintiff's counsel contends that upon reversal we should award restitution. We assume that the court has this power, but we find nothing to call for its exercise in the present case. Besides, the record does not show that a writ of possession issued. If the plaintiff in error voluntarily gave up possession after judgment it was no more than he had agreed to do, and he can not ask the court to put him back. The defendants in error had a common law right to re-enter upon the expiration of the term, and therefore, without regard to the present proceedings, they are now rightfully in possession.

The judgment is reversed.

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Supreme Court of Pennsylvania.

BITTING VS. COMMONWEALTH.

The provisions of the general law, regulating the collection of taxes in force prior to June 25, 1885, which authorizes the board of school directors to appoint the collector of the school tax in their respective districts, is repealed by the general act of June 25, 1885, P. L. 187, regulating the collection of taxes in the several boroughs and townships, which provides in Section 4 that the borough or township collector elected as therein directed shall collect the school tax levied within the borough or township for which he shall have been elected.

Under the act of June 25, 1885, the collector of taxes elected for a township is the collector of the school tax levied in an independent school district within the limits of the township, and entitled to have issued to him the duplicate of said school tax with the warrant for its collection attached.

ERROR to the Court of Common Pleas of Montgomery county.

The facts of the case, as well as the opinion of the court below by BOYER, P. J., were fully reported in case of Com. ex rel. Daniel J. Snyder vs. School Board of Pennsburg Independent School District. 2 MONTGOMERY COUNTY LAW REPORTER, 165.

George N. Corson and *J. Wright Apple, Esqs.*, for plaintiff in error.

Wm. F. Dannehower, Esq., for defendant in error.

The opinion of the Supreme Court was delivered October 17, 1887, by MR. JUSTICE CLARK.

Upon the statement of facts which has been agreed upon, this case must be affirmed. The only question to be determined is the constitutionality of the act of June 25, 1885, entitled "An act regulating the collection of taxes in the several boroughs and townships of the commonwealth."

We have fully considered the question in the cases of Evans vs. Phillipi et al., brought here on a writ of error from Lancaster county, the opinion in which case we have just filed. (See next case.)

Judgment is affirmed.

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EVANS VS. PHILLIPI.

A statute, general in form, is not to be treated as a local law because of the intervention of some local, unrepealed statutes which prevent it from taking general effect.

The prohibitions of the Constitution of 1874 in respect to special legislation are prospective only, and do not operate to repeal local statutes in force at the time of its adoption, though their provisions were inconsistent therewith.

The provisions of Section 13 of the general act of June 25, 1885, P. L. 187, regulating the collection of taxes in the several boroughs and townships, that "this act shall not apply to any taxes the collection of which is regulated by a local law," is not in conflict with Section 7 of Article III of the Constitution of 1874, prohibiting local and special legislation, nor with Section 1 of Article IX, requiring that taxes shall be levied under general laws.

The act of April 21, 1869, P. L. 87, regulating the collection of school taxes in certain school districts, is a local statute, inasmuch as it expressly provides that none of its provisions shall apply to a large portion of the state.

ERROR to Common Pleas of Lancaster county.

E. K. Martin, Esq., for plaintiff in error.

Marriott Brosius, Esq., for defendant in error.

The opinion of the Supreme Court was delivered October 17, 1887, by MR. JUSTICE CLARK.

The plaintiff in error was, on February 16, 1886, elected tax collector of the township of Warwick, in Lancaster county, under the provisions of the act of June 25, 1885, entitled "An act regulating the collection of taxes in the several boroughs and townships of this commonwealth." He gave bond, which was approved, and now claims to perform the functions of that office.

The defendants were the school directors of the same township for the same year, and, although as such directors they levied a school tax for the year 1886, they refused to issue their warrant to the plaintiff authorizing him to collect the same, but delivered a certified duplicate of the assessment and levy to one E. R. Shirk, the treasurer of the school board, pursuant to the act of April 21, 1869, P. L. 87, under the provisions of which the board had for several years previously, by resolution, authorized the collection of the school taxes of the said district. This proceeding by mandamus was thereupon instituted to enforce compliance with the provisions of the act of 1885.

It is contended on the part of the defendants that the act of June 25, 1885, is in conflict with Section 7 of Article III of the Constitution of the commonwealth, prohibiting local and special legislation; that there were at the time of the passage of that act, and still are, local and special acts in force in various parts of the state relating

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to the collection of school taxes, some of them relating especially to Warwick township; and that the concluding clause of the last section of the act of 1885, which provides that "this act shall not apply to any taxes the collection of which is regulated by a local law," necessarily gives to the statute a limited and local effect only.

But if this clause of the last section of the act of 1885 had been omitted, the force and effect of the statute would certainly have been the same. A local enactment, as a general rule, is not repealed by a general statute. "Rarely, if ever," says our brother Trunkey in Malloy vs. Reinhard, 19 Weekly Notes, 43, "does a case arise when it can justly be held that a general statute repeals a local statute by mere implication. The Constitution of 1874 upon many subjects prohibits local or special legislation, but it changes no rules relative to the repeal by legislation of local laws existing when it was adopted." The clause which we have quoted from the act of 1885, therefore, does not change the effect of that statute in the slightest degree, for, as we have said, the force of its provisions would have been precisely the same if it had been omitted.

The single question then is whether or not a statute, although general in form, is to be treated as a local one simply because of the intervention of some local statute, unrepealed, which prevents it from taking general effect. There is an obvious distinction between a statute which upon its face is local and special and one which, although general in form, is thus obstructed in its application. In the one case the local law can not become general except by a re-enactment in general form; whilst in the other, by the repeal of the local law, the special subject affected by it is brought under the general law, the operation of which was previously obstructed. Thus the act of April 21, 1869, could be extended to the whole state only by the re-enactment thereof as a general law; but the act of June 25, 1885, upon the repeal of the local statutes obstructing its operation, would *ipso facto* take effect throughout the state. The latter is therefore in this modified sense a general law; it was passed for the whole state, and may, upon certain contingencies, become applicable and operative throughout the state without change or amendment thereof.

Prior to 1874 the Legislature, in its wisdom, by special laws settled the practice of the courts in specified parts of the state; prescribed the form and requirements of affidavits of defence in actions

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at law; established methods of procedure in the laying out and opening of public and private roads in certain counties, etc. These, and many other enactments of a similar character which in the mind of the Legislature were by local circumstances made necessary, are still upon our statute books, have been for many years received and acquiesced in by the profession and the people, and their repeal is neither sought for nor expected. Can it be that no general statute can be constitutionally enacted upon any one of the various subjects embraced in this great body of private legislation, without an express repeal of every local provision which may be construed to prevent its general application? Peculiar and special provisions too have been made from time to time by local statutes, prior to the Constitution of 1874, for the regulation or prohibition of the sale of intoxicating liquors in many of the townships, boroughs and counties of the commonwealth, which provisions still remain unrepealed and are admittedly in full force. Can it be that the Legislature has no constitutional power to frame a general law regulating the liquor traffic in the state without repealing all these local provisions? Has any one ever supposed that the general liquor law of April 12, 1875, was upon this ground an invalid enactment? And is the more recent act of May 13, 1887, popularly known as the high-license law, to be set aside as unconstitutional and void upon similar grounds?

The prohibitions of the Constitution in respect of special legislation are prospective only. That instrument did not repeal local statutes whose provisions were inconsistent therewith, in force at the time of its adoption (Indiana Co. vs. Agricultural Society, 85 Penna., 359); it merely imposed restrictions on future legislation (Coatesville Gas Co. vs. Chester Co., 97 Penna., 476). Nor was it the intent and meaning of the convention that all future legislation was conditioned upon the repeal of these local laws. No such thing can be found in the work of the convention; such has not been the understanding of the profession throughout the state.

All of these local statutes were in conformity with the Constitution when enacted, and they are valid until they are repealed; and we think that the Legislature, in order to give efficiency to a general law, is not bound to repeal any and all of them which may be supposed to limit its application. We are of opinion, for the reasons we have expressed, that the act of June 25, 1885, must be regarded as a general law applying to the whole state, except in so

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far as its operation is obstructed by existing local statutes passed prior to the new Constitution, upon the repeal of which it will take effect throughout the state.

Nor is the act of 1885 obnoxious to Clause 27, Section 7, Article III, or to Section 1, Article IX, of the Constitution. What we have already said is sufficient to show why no such conflict exists. We hold the act of 1885 to be a general law. It is a general law relating to the collection of taxes in the boroughs and townships of the state. Boroughs and townships are created by general laws, and are the proper subjects of appropriate, independent general legislation as such, and the act establishes a general system peculiarly adapted to the convenience and necessities of the municipal divisions named.

But that the act of 1869 is a local statute admits of no doubt whatever. It expressly provides that none of its provisions shall apply to the cities of Pittsburg or Allegheny or to the counties of Cumberland, York, Franklin, Adams, etc. About one-third of the whole state is permanently excluded from the operations of the act. Nor does it apply to all of the school districts within the territory which it does embrace, but to such only of them as, by resolution of the board of school directors therein, may authorize the collection of the school tax in the manner therein provided. It is thus limited to the districts that may formally accept its provisions, and, according to the doctrine of Scranton City School District's Appeal (113 Penna., 176), it must be regarded as a local law. A law is said to be local and special, however, not because of the new Constitution or of any decision under it but because it falls within the proper definition of a local law before and since 1874.

The act of 1885 had, therefore, no application to the collection of school taxes in Warwick township for the year 1886. The provisions of the act of 1885 are express to this effect. It would have had no application to that township if the act had not been so expressed. The taxes were collectible under the act of 1869, which was a local law unrepealed and in full force.

The judgment is affirmed.

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Court of Common Pleas of Allegheny County.

KNORR VS. COMMONWEALTH.

An information in proceedings for summary conviction for performing worldly employment on Sunday, under the acts of April 22, 1794, and April 26, 1855, in which the affiant alleges as a positive fact the commission of the offence, giving the time and place and the specific acts, is sufficient, although the affiant also asserts that the charge is made on information received.

Query, whether, under the Bill of Rights, Article 1, Section 8, of the Constitution, an information, such as is required in ordinary criminal cases, is required in proceedings under these acts.

CERTIORARI.

Hughey & Bennett, for plaintiff in error.

Yost & Rebman, for defendant in error.

Information was made before an alderman, under the oath of the informant, that V. C. Knorr, the defendant, on July 31, 1887, being Sunday, "did and performed worldly employment and business within said county (the same not being a work of necessity or charity), contrary to the act of Assembly entitled, etc., approved April 22, 1794, and an act entitled, etc., approved April 26, 1855; and deponent specifies the particular acts done and business carried on, as follows, viz.: selling cigars and exposing the same for sale, and keeping his store open for business on Main street near Sixth, Braddock, Allegheny county, Pa. This charge is made on information received."

The defendant was arrested upon a warrant issued pursuant to the request in the information, and entered into his own recognizance to appear and answer the charge. On August 26, 1887, the defendant was tried and was fined $25 and costs, and in default of payment to be committed to jail for thirty days, under the act of April 26, 1855; and a record of the conviction was made in the form prescribed in Section 4 of the act of 1794.

A certiorari was issued August 31, 1887.

The assignments of error raised but a single question, and were all substantially the same as the first one, which was as follows:

"1st. The information does not comply with the provisions of Section 8 of the Declaration of Rights of the Constitution of Pennsylvania, which provides that 'no warrant to search any place, or to seize any person or things, shall issue without describing them as

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nearly as may be, nor without probable cause, supported by oath or affirmation, subscribed to by the affiant,' and the issuing of a warrant was wrongful and illegal."

The opinion of the court was delivered September 16, 1887, by STOWE, P. J.

This was a summary conviction under the act of 1794 and the supplement of April 26, 1855, for doing and performing worldly employment and business on Sunday. The information sets out not only that defendant's store was open for business on Sunday, specifying time and place, but also gives specifically the acts done, viz.: selling cigars. The evidence shows the allegations were true, and the judgment is specific and concise, that defendant is convicted "of selling cigars and exposing the same for sale, and keeping his store open for business on Main street near Sixth street, Braddock, Allegheny county, Pa."

In Com. vs. Wolf, 3 S. and R., 48, Yerkes, J., says: "It was the obvious intention of the Legislature when they introduced into Section 4 of the law for the prevention of vice and immorality, passed April 22, 1794, a form for the conviction of the offences therein specified, to guard against reversals for want of technical niceties."

This conviction contains even more than the form prescribes. But it is most earnestly urged that the conviction must be reversed, because the information says the affiant makes it on information received. The act of 1794 does not provide that complaint should be made under oath. It declares said justices or magistrates may and shall convict such offenders upon his own view and hearing, or shall issue, if need be, a warrant, summons, or capias (according to the circumstances of the case), to bring the body of the accused before him, and the said justices and magistrates shall, in a summary way, inquire into the truth of the accusation, etc.

But even if an information, such as is required in ordinary criminal cases, was required, the information in this case was technically sufficient. The affiant swears *positively* to the fact of selling, etc., and thereby he makes himself responsible for the allegations. It is entirely different from an information saying from information received the affiant is informed and believes, etc. The one is an absolute assertion of a fact, the other of a *mere belief;* the one is sufficient, the other is not.

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It is not for us to consider whether the act is politic or impolitic. Whatever it may be, it is our duty to see that all parties who come into this court convicted in a proper manner shall submit to its provisions, and that conviction in such cases should not be reversed without some substantial failure to comply with its letter or spirit.

Judgment affirmed.

Court of Common Pleas of Luzerne County.

BLOSS VS. KLINETOB.

Where the return of the scire facias on a mechanic's lien sets forth that it was duly served on the terre tenant, such return is conclusive so far as concerns the regularity of the judgment.

RULE to strike off mechanic's lien and judgment thereon, etc.

A. R. Brundage, Esq., for plaintiff.

Q. A. Gates, Esq., for defendant.

The opinion of the court was delivered May 16, 1887, by WOODWARD, J.

The first exception to the mechanic's lien filed in this case can not be sustained, for the reason that the depositions show that the claimant was not a journeyman, as alleged, but a contractor and master builder. The return upon the scire facias shows that the writ was duly served upon the terre tenant, and this disposes of the second exception. The cases referred to in the brief of the defendant's counsel, in support of the third exception, do not seem to us to fit the case before us. Here the contract was made with Klinetob, the defendant, who was in possession of the premises, and the final settlement was with him. We see no good reason for disturbing the lien.

The rules are discharged.

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Court of Quarter Sessions of Montgomery County.

IN THE MATTER OF THE APPLICATION FOR THE INCORPORATION OF THE VILLAGE OF PENNSBURG INTO A BOROUGH.

When an application for the incorporation of a borough is laid before the grand jury, their certificate need not be annexed to the application, although the certificate speaks of such annexation.

Lands exclusively used for farming purposes not necessarily excluded from the proposed borough limits.

Wm. F. Dannehower, Esq., for petitioners.

Charles Hunsicker, Esq., contra.

STATEMENT OF FACTS.

The petition of a majority of the resident freeholders of Upper Hanover township was presented to the court praying for incorporation as the "Borough of Pennsburg," under the act of Assembly relating to the incorporation of boroughs, approved April 1, 1834, and its several supplements.

The grand jury, on the 10th day of March, 1887, presented their certificate of approval in open court, and the court thereupon ordered it entered of record.

Exceptions were duly filed to this action of the grand jury and the court.

The opinion of the court was filed November 14, 1887, by SWARTZ, J.

It is not necessary that the certificate of the grand jury should be attached to the application laid before the grand jury, and the failure of the grand jury to annex the certificate to the petition can not vitiate their finding, although their certificate speaks of the petition as annexed to their report. The papers can be identified by inspection. The certificate is entitled "In re incorporation of the village of Pennsburg into a borough," and is dated March 10, 1887.

The petition and application is endorsed "Application for the "incorporation of the village of Pennsburg, &c., filed March 7, 1887, "in open court. And the same was ordered to be laid before the "grand jury of the present term of court on Thursday, the 10th day "of March, A. D. 1887. By the Court."

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License of Hoy.

The other exception, that lands exclusively used for the purpose of farming are included within the boundaries of the proposed borough, is, we think, without merit.

These lands are in the village and front on the main highway traversing it. We see no good reason for excluding them. If the main street or highway is to be cut out and excluded from the proposed borough limits, then the application for incorporation must fail. The exceptions are dismissed.

And now, November 14, 1887, the judgment of the grand jury is confirmed and the Clerk is directed to annex the certificate to the application, and counsel for petitioners will submit a decree to the court.

IN THE MATTER OF THE APPLICATION TO REVOKE THE RESTAURANT LICENSE OF DANIEL HOY, OF THE BOROUGH OF CONSHOHOCKEN.

The holder of a restaurant license must be a citizen of the United States; when improvidently granted to one not a citizen the license upon application is revoked.

I. P. Wanger and *Isaac Chism, Esqs*, for application.

James B. Holland and *Larzelere & Gibson, Esqs.*, contra.

STATEMENT OF FACTS.

On the 2d day of May, 1887, a restaurant license was granted by the court to Daniel Hoy. On the 6th day of June the constable of the Second ward of Conshohocken made return in due form of law that the said Daniel Hoy had violated the Sunday laws relative to the sale of liquors. On June 13th Daniel Hoy, having been arraigned on said charge, pleaded "guilty," and was duly sentenced to imprisonment. A petition was filed praying the transfer of said license to one Owen Scanlan. It further appeared that Daniel Hoy was not a citizen of the United States when said license was granted by the court, and a rule was taken to revoke the same.

The opinion of the court was delivered November 14, 1887, by SWARTZ, J.

In his application for a license Daniel Hoy made oath that he was a citizen of the United States. It now appears that he was not

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then and is not now a citizen of the United States. The license was granted under a misapprehension of the facts to one not legally entitled to hold such license.

Daniel Hoy violated the law by selling liquor on Sunday. He entered a plea of guilty and suffered punishment. The license having been granted improvidently must be revoked.

And now, November 14, 1887, the license of Daniel Hoy is revoked and the petition to transfer the license to Owen Scanlan is refused and dismissed.

IN THE MATTER OF THE APPLICATION TO REVOKE THE RESTAURANT LICENSE OF JOHN BUTLER, OF THE BOROUGH OF CONSHOHOCKEN.

Where the holders of a restaurant license deceive the court and violate the law, the license should be revoked.

I. P. Wanger and *Isaac Chism, Esqs.*, for application.

Larzelere & Gibson, Esqs., contra.

The facts of the case fully appear in the opinion of the court delivered November 14, 1887, by SWARTZ, J.

Terrence L. Hoy, the former occupant of this house, was convicted on the charge of violating the liquor laws. A mild sentence was imposed under the plea that the defendant had transferred his license to John Butler and had quit the liquor business. It now appears that this was an imposition upon the court, for Terrence L. Hoy remained on the premises, although John Butler was the ostensible holder of the license. Both Hoy and Butler subsequently violated the law and entered pleas of guilty for selling liquor on Sunday. We are now asked to transfer the license from John Butler to Ellen Hoy, the widow of Terrence L. Hoy. The leniency and kindness of the court were abused, and the license must be revoked.

And now, November 14, 1887, the application of Ellen Hoy to have the license of John Butler transferred to her is refused and dismissed, and the license of John Butler is revoked.

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IN THE MATTER OF THE APPLICATION TO REVOKE THE RESTAURANT LICENSE OF LAMAR WOODWARD, OF THE BOROUGH OF CONSHOHOCKEN.

Under the act of May 13, 1887, it is the duty of the court to revoke the license of one who violates the liquor laws.
License in this case was not revoked under the circumstances.

I. P. Wanger and *Isaac Chism, Esqs.*, for application.

James B. Holland and *Larzelere & Gibson, Esqs.*, contra.

The facts of the case fully appear in the opinion of the court delivered November 14, 1887, by SWARTZ, J.

Lamar Woodward pleaded guilty to selling liquor on Sunday; he was sentenced and suffered punishment, and we are now asked to revoke his license.

Two of the five petitioners praying for the revocation of the license have asked leave to withdraw their names from the petition, and a paper numerously signed by citizens of Conshohocken is addressed to the court praying that the license may not be disturbed.

We are of opinion that a violation of the liquor laws clearly made out ought to be a sufficient ground for the revocation of the license of the offender; but we do not wish to act without due warning to all persons holding liquor licenses. The license in this case is not revoked; but we wish it understood that in our judgment a violation of the law ought to work a forfeiture of the license of the offender.

The act of May 13, 1887, P. L., p. 108, is clear on this point. It provides "that upon proof being made to the said court that the "party holding a license has violated any law of this commonwealth "relating to the sale of liquors, the Court of Quarter Sessions shall, "upon notice being given to the party so licensed, revoke the said "license." Woodward's offence was committed prior to the enactment of this law.

And now, November 14, 1887, the rule to revoke license is discharged.

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Court of Common Pleas of Montgomery County.

IN EQUITY.

FRANK H. BOLTON AND GEORGE M. D. BOLTON, COMPLAINANTS, VS. JAMES S. SWARTZ, OWNER, AND THE STONY CREEK IRON COMPANY (LIMITED), LESSEES, AND THE LUCINDA FURNACE COMPANY, DEFENDANTS.

Under the facts of this case, where the injury complained of was denied by the affidavits filed by the defendants, a preliminary injunction was denied.

RULE for preliminary injunction.

The plaintiffs and defendants are riparian owners on opposite banks of the Stony creek, in the borough of Norristown. A bill in equity was filed alleging that defendants were dumping cinder and other refuse upon their property into the Stony creek, thus casting the water of that stream upon the land of the plaintiffs, and were continuing to do so. They prayed for a preliminary injunction.

Larzelere & Gibson, Esqs., for complainants.

Henry Freedley, Esq., for Stony Creek Iron Company.

Charles H. Stinson, Esq., for Lucinda Furnace Company.

The opinion of the court was delivered November 14, 1887, by SWARTZ, J.

The rule for a preliminary injunction was not served upon the defendant, James S. Swartz, and the application was argued as against the Lucinda Furnace Company and the Stony Creek Iron Company (Limited), lessees.

The affidavits on behalf of the Lucinda Furnace Company absolutely deny the facts alleged in the complainants' bill. This defendant claims that the east bank of the Stony creek along the front of its property has not been changed for twenty years, and that no cinder or offal has been dumped into the Stony creek from the furnace.

The Stony Creek Iron Company (Limited), lessees, admit that some filling was done along the front of the mill property occupied by them, but deny that such filling is in the channel of the creek or in any way interferes with the current of the stream or the opposite banks of the complainants.

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They further claim in the affidavits filed that the stream is not in any way obstructed, but from actual soundings shows an increase of area of water-way as the creek approaches the river. On this point the affidavit of the engineer of complainants seems to corroborate the defendants' allegations.

Nearly all the affidavits of the defendants allege positively that the encroachments on the Bolton side of the creek far exceed those on the side of the Stony Creek Iron Company's (Limited) property.

We read carefully all the affidavits in the case and viewed the creek and its banks from Main street to the river. This is not a new question between the respective land owners along Stony creek. The dispute is of long standing, and the rights of the parties should be legally determined without delay. Land along the Stony creek at the point of dispute is valuable, and each party should have his rights ascertained. This can be done by a full examination of the facts before a master appointed for that purpose.

We fail to see how a preliminary injunction can be granted at this stage of the proceedings. Every allegation of the complainants that calls for an injunction is denied. The facts are in dispute.

Where a plaintiff's right has not been established at law or is not clear, but is a question on every ground on which he puts it, he is not entitled to an injunction. Rhea vs. Forsythe, 1 Wr., 503.

A preliminary injunction is emphatically the strong arm of the court, and is never awarded except in a clear case of right and where no doubt exists as to the claim of the plaintiff to the remedy he invokes. Minnig's Appeal, 82 Pa. St. R., 376.

Applying these principles to the facts in this case we must refuse the injunction.

Should either of the defendants during the pendency of the proceedings upon final hearing attempt to extend his banks into the creek in any marked degree, the application for a preliminary injunction can be renewed.

And now, November 14, 1887, the preliminary injunction is refused.

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Court of Common Pleas of Luzerne County.

EDDINGER VS. ADAMS.

In a certain sense an attorney has a lien for his fees upon money or papers of his client, but possession is indispensable to his lien as much as it is to the lien of the ordinary factor or bailee.

Money will not be ordered into court except upon the application of some person who has some show of ownership in or lien upon the fund.

S. S. Winchester, Esq, for rule.

John Lynch, Esq., contra.

The facts fully appear from the opinion of the court delivered by RICE, P. J.

The facts in this case appear to be as follows: May 8, 1876, S. W. Trimmer, Prothonotary, receipted from the Sheriff of Clinton county $258.53, proceeds of sale of personal property on test. fi. fa. This sale had been specially authorized by this court, pending a rule to open the judgment. This rule being still pending, on May 12, 1876, Eddinger assigned the judgment to S. W. Trimmer, then Prothonotary. The rule to open the judgment was subsequently discharged, and on April 24, 1878, on the application of Mr. Winchester, who had been attorney for Eddinger, a rule was granted on S. W. Trimmer, late Prothonotary, to pay the money into court, and that rule was made absolute, Dr. Trimmer making no answer, on September 12, 1878. On March 7, 1879, the present rule was granted to take off the default and to reinstate the original rule. It is to be noted that the rule on the late Prothonotary to pay the money into court was taken by Mr. Winchester in his own right and not on behalf of his former client.

If, in any view of the case, Mr. Winchester could take any portion of the fund, it would be our duty to allow the order of September 12, 1878, to stand and to settle the conflict of ownership of the fund on distribution. But his claim is simply that of an attorney for his fees, and he therefore can under no circumstances claim as distributee. This being the case he has no standing in court to rule the money into court for distribution. He does not claim to be the owner of any part of the judgment, and it has been distinctly decided that he can have no lien on the fund in court. "In a certain sense an attorney has a lien for his fees upon money or papers of his client while they are in his hands. * * * But possession is

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indispensable to his lien as much as it is to the lien of the ordinary factor or bailee." Dubois' Appeal, 2 Wr., 231. This being the inevitable conclusion of the matter, it would be an idle ceremony to compel the Prothonotary to bring the money into court, and would be unwarranted except upon the application of some person who has some show of ownership in or lien upon the fund. Undoubtedly the plaintiff in this execution has behaved badly and ungratefully toward his attorney, but that fact can not alter the plain principle of law to which we have referred.

The rule granted March 7, 1879, is made absolute, and the rule granted April 24, 1878, is discharged.

GALLAND VS. BUTLER COAL CO. ET AL.

On a motion to dissolve a preliminary injunction a mere general denial by affidavit of the equity of the plaintiff's bill, without a denial of the facts constituting the equity, goes for nothing.

MOTION to continue preliminary injunction.

S. F. Strauss and *C. L. Hawley, Esqs.*, for plaintiff.

G. S. Ferris, Esq., for defendants.

The facts appear from the opinion of the court delivered July 30, 1887, by RICE, P. J.

A mere general denial by affidavit of the equity of the plaintiff's bill without a denial of the facts constituting that equity goes for nothing. In the present case, according to the averments of the bill and accompanying affidavits, the facts, as they existed at the time the bill was filed, clearly entitled the plaintiff to an injunction. While the affidavit of F. C. Deninny, Jr., denies that it is the present intention of the defendants to locate their railroad and trestle on plaintiff's land, it does not deny that such was the intention at the time this bill was filed and the injunction granted. It therefore does not deny the equity which gave the court jurisdiction to entertain the bill, or the material fact which justified the issuing of the injunction. Under all the circumstances we think it proper to continue the injunction, at least until answer.

The injunction heretofore awarded is continued until further orders, with leave, however, to the defendants to move to dissolve the same upon filing an answer.

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Court of Common Pleas of Montgomery County.

SITTING IN EQUITY.

CHARLES L. HAMILTON, COMPLAINANT, VS. DANIEL O. HITNER, DANIEL O. HITNER, JR., ET AL., DEFENDANTS.

A bill in equity at the suit of a garnishee to compel parties to interplead is a proper proceeding where the garnishee disclaims title and the claimants in interest are numerous.

Goods and chattels, such as railroad cars, fire brick, etc., not pledged, pawned or demised by the owner, are not subject to an attachment execution but must be sold on fi. fa.

RULE for preliminary injunction.

The bill avers that complainant purchased real estate of Daniel O. Hitner, and gave as part of the purchase money a bond and mortgage for $30,000, payable in five years from October, 1886, which obligations have since been assigned to John A. Righter. Upon the property so purchased were certain stone cars and other personal property still belonging to said Daniel O. Hitner, which have since been levied on as his property under a number of fi. fas. as Hitner's property. Claims of property were filed by D. O. Hitner, Jr., and L. V. Righter, and a Sheriff's interpleader was framed. Complainant also purchased another property of said Hitner, giving him as part of the purchase money a bond and mortgage for $10,000 payable in five years, which obligations have since been assigned to Daniel O. Hitner, Jr.

A number of judgments have been entered against Daniel O. Hitner, who have issued attachment execution thereon, making this complainant garnishee, and claiming the interest due upon the mortgages is subject to their attachment by reason of the assignments of said mortgages by Hitner having been made in fraud of creditors. The complainant disclaims all title to the interest attached as well as the articles of personalty. He prays to be permitted to pay into court the interest now due on the mortgages, as well as deliver into the custody of the court the personal property; and to compel the several defendants to interplead concerning the ownership of the same, as well as to enjoin Righter and Hitner, Jr., from proceeding on their bonds or mortgages until the ownership thereof is determined.

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William W. Porter and *H. M. Brownback, Esqs.*, for complainant.

B. E. Chain, L. M. Childs, James B. Holland and *Fox & Son, Esqs*, for attaching creditors.

H. K. Weand and *Charles Hunsicker, Esqs*, for claimants.

Theo. W. Bean and *H. B. Dickinson, Esqs.*, for execution creditors.

The opinion of the court was delivered November 26, 1887, by SWARTZ, P. J.

A bill in equity to interplead at the suit of the garnishee is a proper proceeding where the garnishee disclaims all title or interest in the property claimed by independent parties. Especially is this so when, as in this case, the independent claimants are numerous. Wilbraham vs. Horrocks, 8 W. N. C., 285, and cases there cited.

The preliminary injunction was properly granted so far as it relates to the mortgages and accrued interest on the same. Without such injunction the bill of interpleader was useless. The injunction was issued under Rule LXXV of equity practice and in compliance with said rule. It is sustained by the familiar test of irreparable injury. Foreclosure of the mortgages may be ruin to the complainant. Filing his answer to the interrogatories or paying the interest due into court would not protect him, for the record holders of the mortgages are not parties to the attachment proceedings.

It is admitted that the bond and mortgage of $30,000 and accrued interest of $750, assigned to John A. Righter, are the property of said Righter, and the attaching creditors disclaim any right, title or interest in the same. The injunction as to the said John A. Righter is therefore dissolved.

The preliminary injunction against Daniel O. Hitner, Jr., is continued, except that the said Hitner is not enjoined from entering judgment upon the bond accompanying said mortgage of $10,000; provided, however, that the said Charles L. Hamilton shall pay or cause to be paid the accrued interest and accruing interest when the same shall fall due, as the court has hereinafter directed.

The preliminary injunction against the defendants James C. Hand & Co., B. Adams, James Moore, M. H. Gallagher, Thomas W. Morris and James Thompson is continued so far as the same relates to the attachment proceedings against the said bond and

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mortgage of $10,000 with accrued interest, and dissolved so far as it relates to the attachment proceedings against the stone cars, fire brick, etc.; this injunction not to interfere with any proceedings said attaching creditors may see fit to prosecute against any persons other than the said Charles L. Hamilton, for moneys, goods and chattels specified in the plaintiff's bill.

The said Charles L. Hamilton shall pay into court the sum of $250 interest due on the mortgage of $10,000, and shall pay all interest falling due upon said mortgage prior to the adjudication of the rights of the several claimants to said bond and mortgage or its interest, as the court may lawfully direct at the times such interest may be due.

The goods and chattels mentioned in the second paragraph of complainant's bill were left, as he alleges, on his premises by Daniel O. Hitner and at said Hitner's risk. They were not pawned, pledged or demised by the owner, and are not subject to attachment execution under the act of June 16, 1836, or any other act of Assembly that we are aware of. Hall vs. Fitler Manuf'g Co., 10 Phila., 370; Lennig's Appeal, 9 W. N. C., 503; Good vs. Obertauffer, T. and H. Pr., Section 1182.

There is nothing in the Sheriff's return to the attachments showing that the cars, brick, etc., were attached by him, nor is there anything to indicate that the creditors claim a lien upon said goods by virtue of their writs of attachment. To secure such liens they should proceed by fi. fa., as was done by some of the creditors.

As to the eight four-wheel stone cars the issue is duly framed between the execution creditors and the claimants Hitner and Righter. As to the other articles there is no claimant other Daniel Hitner, the owner; the attaching creditors are not entitled to claim a lien upon them by virtue of their attachments. We can not award interpleader proceedings as to these articles or provide a custodian for them.

The rule to show cause why the defendants should not interplead, so as to determine the ownership of said $250 or the bond and mortgage of $10,000, is made absolute. The parties to said interpleader are the attaching creditors above named on the one side, and Daniel O. Hitner, Jr., on the other side.

Counsel for the respective parties will prepare a decree providing for such interpleader and submit the same to the court.

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JACOB G. LANDES TO USE VS. JOSEPH SHRAWDER.

Judgment on bill single will not be opened upon the unsupported affidavit of the defendant contradicted by the plaintiff on oath.

RULE to open judgment.

George N. Corson, Esq., for rule.

Larzelere & Gibson, Esqs., contra.

The facts appear from the opinion of the court delivered November 26, 1887, by SWARTZ, P. J.

Under the evidence in this case the judgment can not be disturbed. An examination of the testimony and the plaintiff's accounts show that the money is due and was due when the bill single was executed.

The defendant does not dispute the debt but claims that he signed a bill single when he intended to give an ordinary promissory note.

He did not read the note or ask any one to read it for him. He says, "I presumed it was a note to bank." Judgment was entered upon the bill single, and at the request of the defendant the plaintiff released some of the real estate bound by the lien of this judgment. The defendant failed to make any objection to the judgment at that time, and did not dispute its validity then, but waited for months after he had full knowledge of the existence of the judgment before he attempted to question its correctness.

The testimony of the defendant intimates that he was deceived by the conduct of the plaintiff, and thereby signed the judgment note. Against this insinuation we have the oath of the plaintiff, who states positively that the character and purpose of the note were fully and truly explained to the defendant.

A judgment will not be opened upon the unsupported affidavit of the defendant contradicted by the plaintiff on oath. Kocher vs. Rice, 2 Luz. Leg. Reg., 24.

A judgment will not be opened where the testimony of the plaintiff and defendant counterbalance. Early's Appeal, 90 P. S. R., 321; Zaring vs. Early, 2 Pears., 352.

In Wernet's Appeal, 91 P. S. R., 322, the court say: "We have "several times decided lately that on an application to open a judg- "ment it is proper for the court to weigh the evidence and to de-

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"cide according to the preponderance thereof." See also Roenigk's Appeal, 2 Cent. Rep., 68.

"Until overcome by testimony that, if believed, ought to move "a chancellor to decree that the writing is void or should be re-"formed because of forgery, fraud or mistake, it must be suffered to "stand." Knarr vs. Elgren, 2 Cent. Rep., 828.

Under the principle here laid down the judgment must be suffered to stand.

And now, November 26, 1887, the rule to open judgment is discharged.

COMMONWEALTH EX REL. THOMAS WILSON ET AL. VS. ISAAC D. HEEBNER ET AL.

Where a school district claims the right to send pupils to an adjoining district to be more conveniently accommodated, the names of such pupils should be furnished to the school board of the adjoining district.

Before a mandamus can issue it should appear that an honest effort was made to secure an arrangement as provided by the act of May 8, 1854, unless it also appears that the districts acted arbitrarily to evade duty.

Facts in this case are not sufficient to warrant a peremptory mandamus.

APPLICATION for peremptory mandamus upon the return of the alternative mandamus.

On October 25, 1887, the petition of the school directors of Montgomery township was presented, setting forth that a part of the territory of their township was without a school-house of easy access to thirteen children of Montgomery township living near to the borough of Lansdale, and alleging that application had been made to the school board of Lansdale borough to admit them into their schools; that said directors had refused so to do unless they should receive the sum of two dollars per month, which was deemed excessive by relators. Upon this petition a writ of alternative mandamus issued.

On November 7, 1887, an answer was filed, as well as a motion to quash the writ.

Isaac Chism, Esq., for relators.

Louis M. Childs, Esq., for respondent.

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Com. ex rel. Wilson et al. vs. Heebner et al.

The opinion of the court was delivered December 5, 1887, by SWARTZ, P. J.

The petitioners base their proceedings upon the provisions of the act of Assembly of May 8, 1854, Section 23, P. L. 622, which reads as follows: "And if it shall be found that on account of great distance from or difficulty of access to the proper school-house in any district some of the pupils thereof could be more conveniently accommodated in the schools of an adjoining district, it shall be the duty of the directors or controllers of such adjoining districts to make an arrangement by which such pupils may be instructed in the most convenient schools of the adjoining district; and the expenses of such instruction shall be paid as may be agreed upon by the directors or controllers of such adjoining districts by resolution or agreement entered upon the minutes of the respective boards."

The respondents moved to quash the writ of alternative mandamus, and also filed an answer saying they ought not to admit the thirteen pupils from the Montgomery school district: First, because the names of such pupils were not furnished to the Lansdale school board; secondly, because the petitioners refused to agree to pay any reasonable fixed price and failed to tender any clear and definite contract whatever; thirdly, because the Lansdale schools are filled to their entire capacity with the pupils of the Lansdale district, and to admit the thirteen pupils from the Montgomery district would necessitate the furnishing of an additional school-room and the employment of an additional teacher. The names of theparents of the thirteen pupils were given to the secretary of the Lansdale school board.

What constitutes great distance or difficulty of access depends upon circumstances. A child at the tender age of six years will experience greater difficulty in going over bad roads for half a mile than a boy of fifteen years in going over a similar road for two miles. The age of the pupils, the density of the population, customs of the locality, and all other circumstances, should be taken into consideration by the directors who are called upon to admit pupils from adjoining districts. Freeman vs. Franklin School District, 1 Wright, 385. We are asked now to compel the Lansdale district to admit thirteen pupils without being able to give their names, and before the directors have had an opportunity to inquire as to the propriety or necessity of admitting these particular children. School directors are invested with large discretionary powers, and we must give them

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full opportunity to exercise such discretion before we can find them guilty of official misconduct in the abuse of such discretion.

The names should have been furnished to the Lansdale school board. It is true that the correspondence alleges that the children presented themselves for admission, but this was before the Montgomery district had done anything as a school board which made them liable to the Lansdale school district for the expenses of instruction; and until such liability was fixed Lansdale could refuse to admit the pupils without any inquiry as to the merits of the case of the pupil demanding admission. There was nothing at that time upon the minutes of the Montgomery district fixing any liability, or if there was it had not been communicated to the Lansdale board. This was an absolute prerequisite. Cascade School District vs. Lewis School District, 43 P. S. R., 318.

Has the Montgomery district complied sufficiently with the requirements of the act of May 8, 1854, to entitle it to the relief prayed for? It is the duty of the directors of the adjoining districts "to make an arrangement by which such pupils may be instructed," "and the expense of such instruction shall be paid as may be agreed upon by the directors or controllers of such adjoining districts by resolution or agreement entered upon the minutes of their respective boards." This provision in the act "was calculated to prevent irregular and partial agreements," "both boards being required to deliberate and to record the result of their deliberations for the information of all concerned, and the interests of both districts would be guarded." The imperative rule of the statute remains and must be obeyed. See Woodward, J., in Cascade District vs. Lewis District, 43 P. S. R., 321.

We can not say that the Lansdale district refused to make an arrangement. They demanded two dollars per month; and, so far as we know, this may or may not have been a just and reasonable charge. Montgomery township says, "We will pay what it costs you." No doubt they honestly believed the charge of two dollars excessive, and they therefore reserve the right to have the question legally determined when they are called upon for the money. The respective parties evidently failed to catch the spirit of the act. The expenses shall be agreed upon; and, like business men, they ought to sit down and compute the cost, and not deal at arm's length with each other. If two dollars is too much, call on Lansdale for their

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computation; if incorrect, point out the errors and see for yourself what may be considered a reasonable allowance. On the other hand, Lansdale had ample opportunity to justify its charge in an answer to the letter of August 29, 1887, although this communication may not have called for such proof until the bill for instruction should be presented. School boards should pay their obligations when due. And how could Lansdale pay the costs of instruction for the Montgomery children if Montgomery will not furnish the money until after long litigation, when the court shall have fixed the amount of their liability?

If it appeared that either district acted arbitrarily for the purpose of evading its duty, the court ought to interfere; but we can not say that Lansdale had any motive other than a desire to have a just compensation fixed and a determination not to accept a contract which was sure to end in litigation before a court and jury.

The third objection to the admission of the children raises the question whether the Lansdale district is required to receive the pupils if such admission necessitates the employment of an additional teacher and the furnishing of an additional school-room. If an additional school must be provided to accommodate these children, why should not Montgomery provide for her pupils? How can it be said, under such circumstances, that the children "can be more conveniently accommodated" in the one district than in the other? Each borough and township forms a separate school district, and we can not disregard the dividing lines unless some good reason is shown.

We are sorry that the education of these children should suffer by reason of this contest between the school boards, but we must decide the case upon the facts presented. No doubt a little more forbearance and consideration in the beginning on the part of the respective school boards would have solved the problem satisfactorily.

And now, December 5, 1887, it is adjudged that the answer of the respondents is sufficient, and the peremptory mandamus can not issue.

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JACOB KEELEY VS. CHARLES A. RITTENHOUSE. RACHEL HUNSICKER VS. CHARLES A. RITTENHOUSE.

Where the widow refuses to accept the provisions made for her under a will, and takes he share under the intestate laws, such act does not change the character of the legacies given to other persons under the will.

Where the will gives a legacy, payable after the death of the widow, to a son "upon the same conditions and restrictions as I shall hereinafter provide for him," and makes subsequent conditions and restrictions in relation to legacy presently payable, such conditions and restrictions apply with equal force to the legacy payable after the death of the widow.

MOTION to quash attachments in execution.

Franklin March, *F. G. Hobson* and *H. M. Brownback*, *Esqs.*, for plaintiffs.

Charles Hunsicker, *Esq.*, for defendant.

E. L. Hallman, *Esq.*, for garnishees.

The facts of the case sufficiently appear from the opinion of the court delivered December 12, 1887, by SWARTZ, P. J.

The facts upon which the motion is based to quash the writs appear in the petition of the defendant.

The will of Henry R. Rittenhouse provides: "I give, devise and bequeath unto my said executors hereinafter named, or the survivor of them, in trust the sum of six thousand dollars that they or he do and shall put and place the same out at interest on good security, and pay over the interest thereof from time to time when and as the same shall be got in and received unto my wife Sarah Rittenhouse during the term of her natural life. * * * And from and immediately after the death of my said wife Sarah Rittenhouse I give, devise and bequeath the principal sum of six thousand dollars, * * * one-half thereof to my daughter Mary Thomas absolutely, the other half thereof to my son Charles Rittenhouse upon the same conditions and restrictions as I shall hereinafter provide for him."

After providing for some special legacies the testator disposes of the remainder of his estate as follows: "Of the residue I give and bequeath one-half thereof to my daughter Mary Thomas, her heirs and assigns forever. The other half I give, devise and bequeath to my executors, or the survivor of them, in trust that they or he do and shall put and place the same out at interest on good security, and pay over the interest thereof from time to time when and as the same shall by them or him be received to my said son Charles Rittenhouse during the term of his natural life; provided he, the said Charles Rittenhouse, appropriate the said interest money towards

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the support and maintenance of himself and family. And if the said Charles Rittenhouse shall fail to use said interest for the benefit of his family, then I order, direct and empower my said executors to pay the same over to the wife of said Charles Rittenhouse in parts or total for herself and family during the natural life-time of said Charles Rittenhouse; and at and immediately after the death of my said son Charles Rittenhouse I give, devise and bequeath the principal sum of said trust fund to the children of the said Charles Rittenhouse share and share alike."

Sarah Rittenhouse refused to take under this will. She received one-third of the personal estate absolutely, and one-third of the proceeds of the real estate was secured in the respective properties of the testator, the interest thereof to be paid to her for life.

Sarah Rittenhouse is dead, and the creditors of Charles Rittenhouse claim that he is entitled to receive absolutely one-half of the said $6000 trust fund. They also claim that one-half of the purchase money secured in the properties as aforesaid passes absolutely to the said Charles Rittenhouse.

We find nothing in this will to sustain the position of the attaching creditors. The purchase money secured in the real estate is part of the residue of the estate, and as such one-half thereof passed to the executors in trust for the purposes fully defined in the will.

The fact that the widow took her dower at common law can not change the character of interest Charles Rittenhouse had in the residue of the estate; he still had but a life estate. The will must be read as if the provisions made for the widow had been stricken out. She takes her share under the intestate laws and the balance is distributed under the provisions of the will. Heineman's Appeal, 92 P. S. R., 95.

Does the trust defined in the latter part of the will apply to the $6000? The will says that the share of Charles in said $6000 is given "upon the same conditions and restrictions as I shall hereinafter provide for him." The attaching creditors say that the testator failed to make any provision in the subsequent clauses of the will as to this $6000. If the testator had said the fund was to be held as "I shall hereinafter provide," there might be some force in this argument. But this was not his intention, for he says it is to be held upon "the *same* conditions and restrictions as I shall hereinafter provide for him." The conditions under which Charles receives his

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share of the residue, *these same conditions and restrictions*, shall apply to the $6000 fund. These subsequent conditions and restrictions were provided by the testator and give Charles but a life estate upon condition that he uses the income for his family, and the principal sum is not subject to attachment execution at the suit of the creditors of Charles Rittenhouse.

It does not appear that there is any income or interest due to Charles, and if there is his claim of the exemption would defeat the attaching creditors. Charles has no absolute control over the interest, and under Keyser vs. Mitchell, 67 P. S. R., 473, it is very doubtful whether any of the income is attachable under a judgment against Charles.

The writs of attachment execution are quashed at the costs of the plaintiffs in the respective suits.

Court of Quarter Sessions of Montgomery County.

COMMONWEALTH VS. CHARLES SLINGLUFF, JR.

A tax collector appointed prior to the passage of the act of June 3, 1885, is liable under said act if he collects moneys after its passage and embezzles them; provided, such embezzlement occurred within two years prior to the finding of the indictment.

MOTION for a new trial.

I. P. Wanger, Esq., District Attorney, for commonwealth.

Jacob V. Gotwalts and *George N. Corson, Esqs.*, for defendant.

The facts sufficiently appear from the opinion of the court delivered December 5, 1887, by SWARTZ, P. J.

Defaulting tax collectors are punishable under the act of June 3, 1885. Section 65 of the criminal code provides a different punishment for embezzlement by municipal and township officers, and so far as it relates to embezzlement by tax collectors is repealed and supplied by the said act of 1885. The very title of the act indicates this—"An act to punish defaulting tax collectors."

The defendant, however, can not complain. Whether the new act supersedes the old is immaterial; he was tried under the new act, and this was clearly in force. He claims that he was misled and

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came unprepared to defend against the new act, and was therefore entitled to a continuance. He was bound to know of the act of 1885, and ought to have known that he must answer under it.

He was charged with collecting money as tax collector and embezzling the same by appropriating the money to his own use. This is an offence pointed out by the new as well as the old act, and a good defence under the old act would have served the defendant equally well under the new.

The defendant was tax collector up to April or May of 1887, when he handed over his books to the school board. Prior to that time he demanded and received the taxes as collector. He held the duplicates of the districts with the warrants of the school board attached. The school board treated him as their collector. By lapse of time he may have lost some of the legal process that he was entitled to use as collector when the duplicates were placed in his hands; but he was still acting as tax collector and receiving money as such, and should therefore be liable and responsible as tax collector.

It is argued that the defendant can not be punished under the act of June 3, 1885, because the law was enacted subsequent to his appointment as collector. This act does not relate to the appointment of collector, nor does it impose new duties on the collector. He had notice of the act before he committed the offence, for the jury was distinctly told that they could convict only for acts committed subsequently to the passage of the act of June 3, 1885, and within two years prior to the finding of the indictment. We can not presume that the defendant, when he accepted the appointment, intended to embezzle the school funds, and therefore studied the criminal code to determine the penalty; but even if he did he can not complain, for the penalty under the new act is not as severe as under the old act. The passage of the act of June 3, 1885, was to his advantage. We can not agree with counsel for defendant that the act of June 3, 1885, punishes a collector for failing to pay over moneys not collected. The offence consists in "failing to pay over the same"; that is, in paying over the money "so collected by him." We deem it unnecessary to comment on the other reasons for a new trial.

And now, December 5, 1887, the motion and reasons for a new trial are overruled, and upon motion of the District Attorney the defendant will be sentenced.

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Court of Common Pleas of Montgomery County.

JAMES R. WEIKEL VS. LOWER PROVIDENCE LIVE STOCK INSURANCE COMPANY.

In an action on a policy of insurance for the loss of live stock, the provision that in case any animal becomes disabled through accident the insured must give notice to the company, who shall appoint a committee to examine the animal, and if they consider her worthless and incurable to direct her to be killed and appraise her value: the report of such a committee that the animal was not worthless and incurable is not binding upon the insured, but he may maintain an action if he kill the animal if the jury believe the same to be worthless and incurable.

An assessment levied after the death of an animal insured, remaining unpaid, will not defeat the right of recovery.

The words "worthless and incurable" defined and illustrated.

ACTION on policy of insurance.

H. K. Weand and *F. G. Hobson, Esqs.*, for plaintiff.

Theo. W. Bean and *Jacob A. Strassburger, Esqs.*, for defendant.

The facts appear from the charge of the court delivered September 22, 1887, by SWARTZ, J.

Gentlemen of the Jury—This is a suit brought by James R. Weikel against the Lower Providence Live Stock Insurance Company on a policy of insurance. The plaintiff had a bay mare insured in this company for $150, and he now brings suit to recover for the loss of that mare. He claims by his testimony that this mare was injured while at work upon the horse-power, and that by reason of that injury she became worthless and incurable, and that he killed her. The company claims that it should not pay for this horse, because the constitution, by-laws and policy provide that when a horse is injured, and the insured deems him worthless and incurable, he shall ask for the appointment of a committee, and that that committee shall determine whether the horse is worthless and incurable; and if they so find the owner shall be directed to kill him, and an appraisement shall be made of the horse; that the owner or insured did in this case apply for the appointment of a committee or committees; and that the committee, after having examined the horse, concluded that the horse should not be killed, and refused to give the direction to have her killed, and failed to appraise her; and that this action of the committee is final and conclusive against the plaintiff and is a bar to his recovery in this case.

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We charge you that this is not the law; that this finding of the committee was not conclusive against the plaintiff; that he had no voice in the selection of this committee; and the policy did not provide that such finding of the committee should be conclusive as against him. And if the company desired the report of the committee to have such an effect, it was their duty to so incorporate it in their policy. The company also says it should not pay for this horse because the plaintiff is at this time, and has been since the 24th day of October, 1885, in arrears for taxes assessed by this company against him. It appears, however, that at the time this suit was brought, on the 18th day of July, 1885, there was no tax due or assessed against Mr. Weikel, and that all taxes that were asked of him and that were assessed against him were paid up to the 24th day of October, 1885. That being so, the failure to pay the tax assessed or levied on the 24th day of October, 1885, is not a bar to his recovery in this case. The company also says it should not pay for this horse because the horse was not worthless and incurable, or at least not worthless, and that they did not insure against accident which resulted only in injury to the animal, and thereby depreciated the animal's value.

Whether the company did so insure or not is immaterial in this issue, because the plaintiff here claims by his declaration in this suit that his animal was worthless and incurable, and that he sustained a total loss. He stands upon his right to recover the value of his horse, or the amount for which he was insured, on the ground that it was a total loss. Therefore you will inquire whether this horse was worthless and incurable. This is the all important inquiry for you to consider. It is not my duty to give you an opinion. I have no right even to do that. The responsibility is entirely with you. You are to determine from the evidence in this case whether this horse was worthless and incurable. Your judgment is far better than that of the court. You are twelve men, selected for your knowledge, skill and experience in determining questions, and your verdict and judgment upon the question of fact would be far more important than any opinion the court might have.

Now, then, when is a horse worthless? He is worthless when he is valueless; that is, when his ability to earn is not equal to the cost of his keep and care, and when the prospect of his ability to earn in the future is not such as would pay for his keep and care.

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If you find that the condition of this animal was such that his ability to earn money in the ordinary and usual purposes for which horses are used was greater than the expense of his keep and care, or if the prospect of his ability to earn money in the ordinary and usual purposes for which a horse can be used was such that he could earn more than his care and keep, and by reason of his present ability or by reason of the prospect of his future ability he had a value in the market, then he was not worthless. Now, then, you will determine by this test, or any other test that you may have that embraces these points, whether he was worthless and incurable.

Because a horse may bring a money value when he is sold, it does not prove that he is not worthless. For example, a glandered horse may be sold and bring a money value, but yet the horse would be worthless, because he would be incurable and the disease which he has would be communicated to other horses, so that he could not be used for the ordinary and usual purposes for which horses are used. Now, you will take the testimony on the part of the plaintiff and consider it. The plaintiff testifies that he was worthless and incurable, and that he was compelled to kill him. He kept him until the 10th day of June, 1885, the accident having occurred on the 27th of December, 1884, and he tells you that he has had opportunities to see and to observe the effect that the accident had upon the animal. He also calls witnesses. He calls veterinary surgeons that attended him or examined him in his life-time, and veterinary surgeons that were present at the time the horse was killed and examined the bones and the condition of the leg after the horse was killed. He also has witnesses who saw the horse in his life-time and made examinations, some witnesses with some particularity, others with less care, and they tell you that the horse was worthless.

On the other hand, the defendant shows by its veterinary surgeon, who examined this horse, that the horse was not worthless; that from a careful examination of the horse he finds that the future prospect of the ability of this horse to earn money was such that he still had a market value. You also have the testimony of witnesses, such as members of the committee who examined this horse, some with care, others with less care, and they tell you that this horse, notwithstanding his condition, was still valuable for the ordinary and usual purposes for which horses are used, and had a market value ranging from $30 to $60. Now, then, you will weigh this testi-

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mony, and you will say from the testimony whether this horse was worthless or incurable. You will take into consideration the opportunities that the witnesses had to obtain knowledge to testify before you, because ordinarily the witness who has the best opportunity to examine, and who embraces the opportunity, would become the strongest witness and one upon whom you could best rely. The man who simply looks at a horse, without making any examination except to see him walk, would not, all other things being equal, be as able to give you light on the subject as a man who saw the horse move, examined him, moved his foot, moved the joint, and gave it a careful and critical examination. Therefore you will ask yourselves, when you weigh the testimony of the various witnesses, whether this one or that one had particular opportunities and availed himself of the opportunities to examine the horse. The testimony is entirely for you.

It is an important case to the plaintiff, and it is an important case to this company; and if you give the same care and attention to it that the counsel on either side gave to it, and as the court has endeavored to give to it, I have no doubt you will reach a just conclusion. If you believe the uncontradicted testimony of the plaintiff as to his actions in going to the President, Vice President, or company, and asking for a committee to value and appraise this horse, on the ground that he was worthless and incurable; and if you believe the uncontradicted testimony that he communicated to the President of this company before the second committee was appointed, that he would kill the horse; and if, in addition, you find that this horse was worthless and incurable, then your verdict should be for the plaintiff. Whether the plaintiff can recover in this case, there being no notice to the President, Vice President or company, defendant, after the third committee reported, of the intention to kill the mare, and no notice to the President, Vice President or company, after the mare was killed, that the plaintiff had suffered the loss of property, is a question the court has reserved, and therefore you have nothing to do with it; but you will find your verdict regardless of that point which I have reserved.

Now, gentlemen, you will take this case. It has been long and tedious, as all horse cases are found to be, but it deserves your careful consideration. And I have no doubt you will give it the consideration that it deserves, and render a verdict according to your best judgment.

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JAMES R. WEIKEL VS. LOWER PROVIDENCE LIVE STOCK INSURANCE COMPANY.

When a live stock insurance company by its committee decides that an animal is not rendered worthless by an accident, and refuses to give an order directing the killing of the same, as provided by its by-laws, such company is not entitled to notice after the animal is killed, and want of such notice will not prevent a recovery in an action on the policy.

MOTION to strike off judgment entered in favor of plaintiff and enter judgment in favor of defendant *non obstante veredicto.*

H. K. Weand and *F. G. Hobson, Esqs*, for plaintiff.

Theo. W. Bean and *Jacob A. Strassburger, Esqs.*, for defendant.

The facts appear in the opinion of the court delivered December 12, 1887, by SWARTZ, P. J.

The verdict in this case was taken subject to the point reserved. The court announced at the trial that a full hearing would be given before final judgment, upon the point reserved which raised the question of sufficiency of notice of loss. By an oversight the defendant failed to enter a motion for judgment *non obstante veredicto*, and judgment was entered in favor of the plaintiff. The defendant is entitled to the hearing on the reserved question, and we therefore direct that the judgment be stricken from the record.

After a full argument of counsel on the reserved point we are of opinion that the plaintiff gave all the notice of loss necessary under his policy and the facts in the case. He applied for a committee to direct the killing of the mare and to assess the loss. When the decision was adverse he repeated his request, and another committee was appointed. The President of the company was notified that the mare would be killed. Still another committee was appointed, and for a third time the committee reported that the animal was not worthless. The mare was not appraised because the committee reported the animal was not worthless. The company had full knowledge of the condition of the animal, the plaintiff kept her more than five months after the accident, she was examined again and again by the representatives of the company, and because the company found she was not worthless it disputed all liability to pay for any loss or injury.

The company was not to pay for the *death* of the animal but for the *loss* or *injury* resulting from the accident, an injury which rendered her, as the jury found, worthless and incurable.

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The suit was brought about the time the mare was killed, and it does not appear anywhere in the policy that by failure to give notice of loss the insured loses his right to recover. In Insurance Company vs. Evans, 6 Out., 284, Green, J., says: "Ordinarily when "policies prescribe fixed times for notice of loss they provide that if "the notice is not given within the prescribed time the policy shall "be void or there shall be no right of action on it. In such cases "the terms of the contract require the court to enforce the forfeit- "ure. But forfeitures are not favored, and certainly in such a case "as this such consequences can not be implied."

There was no purpose in giving notice that the animal had been killed, for the company had fully decided that there was no liability on its part to pay for any loss.

The prior judgment was stricken off so that the defendant may within the usual time after final judgment seek relief in the higher court if he believes injustice was done in the trial of the cause.

And now, December 12, 1887, it is ordered that judgment be entered for the plaintiff on the point reserved.

Orphans' Court of Montgomery County.

Estate of Jesse Roberts, Dec'd.

Letters of administration c. t. a. are properly granted to the legatee entitled to receive the whole of the personal estate.

The next of kin, if insolvent and indebted to the estate, can not be allowed to administer.

Appeal of Isaac N. Roberts from the decision of the Register of Wills of Montgomery county granting letters of administration c. t. a. to Hannah C. Egbert under the will of Jesse Roberts, dec'd.

Esq., for appellant.

N. H. Larzelere and *M. M. Gibson, Esqs.*, for appellee.

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Roberts Estate.

The facts appear from the opinion of the court delivered November 26, 1887, by SWARTZ, J.

The will of Jesse Roberts provides as follows: "I do hereby will and bequeath all my real and personal property wheresoever the same may be, to my cousin, Hannah C. Egbert, for her entire use and disposal during her life after my debts are all paid."

There is no disposition over of the personal or real estate after the death of Hannah C. Egbert, and she is therefore entitled to the personal estate absolutely, Brownfield's Estate, 8 Watts, 465. Being the sole legatee as to the entire personal estate, letters of administration were properly granted to her. See act of March 15, 1832, Section 22.

The appellant, Isaac N. Roberts, is not entitled to letters of administration even if the Register was in error in granting such letters to Hannah C. Egbert. According to the testimony taken before the Register, the appellant is insolvent and a debtor to the estate. "Those interested in the estate are entitled to the security of an administrator's personal liability as well as to that of his bail." "If letters may be granted to an insolvent person they have but the single security of the sureties on the administration bond." Levan's Appeal, 2 Cent. Rep., 571.

The testimony also shows that Hannah C. Egbert is a creditor of the estate to the entire amount thereof, or at least to more than the entire personal estate, and she holds the judgment of the testator for $2663.

The letters were properly granted and the appeal is dismissed.

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Court of Common Pleas of Philadelphia County.

HUMPHREY ET AL., ADM'RS, VS. SMITH.

Notwithstanding the act of May 25, 1887, and the rules of court adopted to carry out its provisions, the plaintiff may still have judgment for want of an appearance.

MOTION for judgment for default of appearance.

The summons, which was issued on June 28, 1887, returnable the first Monday of July, 1887, was duly returned by the Sheriff as "served." On July 1, 1887, three days before the return day, the plaintiff filed a declaration and a copy of the note upon which suit was brought. The defendant having neglected to cause an appearance to be entered for him, the plaintiff applied to the Prothonotary for judgment for default thereof. The Prothonotary, deeming it to be questionable whether, under the act of May 25, 1887, P. L. 271, he had any right to enter such judgment, refused to do so unless instructed by the court. Whereupon plaintiff made this motion.

P. K. Erdman, Esq., for motion.

The opinion of the court was delivered October 15, 1887, by ALLISON, P. J.

Neither the act of May 25, 1887, nor the rules of court adopted to carry out its provisions, in any way alter, nor do they abolish, the right of a plaintiff to have judgment for default of appearance. That this is the opinion of the board of judges who formulated those rules is manifest from a reading of the first paragraph of Section 126 (a): "The plaintiff shall serve a copy of the statement of claim on the defendant or his attorney of record, if he has one, at least fifteen days before moving for judgment for default, *except for want of an appearance.*"

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